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No. .....

IN THE

Supreme Court of the United States

October Term 1980

HAROLD A. TOSO,

Petitioner,

vs.

CITY OF SANTA BARBARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

Questions Presented.

1. Where after exhaustion of administrative remedies and a trial on the merits, the trier of fact expressly finds that petitioner's application for permission to use his land for purposes contemplated by the local General Plan was denied because:

(a) City officials so acting had a personal bias and prejudice against petitioner, which deprived him of a fair hearing.

(b) such city officials had a conflict of interest, which deprived petitioner of a fair hearing,

(c) such city officials changed the General Plan under which petitioner sought land use approval as a result of an illegal, secret "executive" session without notice, hearing or supporting evidence,

(d) in such secret meetings such city officials expressed ill-will toward petitioner, his attorney and his expert witness, and

(e) such city officials intended that denial of petitioner's application would prevent any development of the subject property prior to the city's then planned acquisition of that property,

is it constitutionally permissible for a state court to deny Petitioner any remedy whatever, either specific or monetary?

2. Where a city, acting in response to a property owner's lawful request for land use approval for a use consistent with the city's General Plan, announces its intention to acquire the subject property, holds a city-wide referendum whether to so acquire it (in which the majority of the voters approves the acquisition), denies the owner's application (by a process consisting of the various illegalities enumerated in Question 1 above), and then rezones the property to other [unprofitable] uses, all of which has a detrimental effect on the property's value, use and marketability, and which causes the property owner to lose the property, has there been a taking of property without just compensation, or a deprivation of property without due process of law, within the meaning of the Fifth and Fourteenth Amendments?

3. Is it constitutionally permissible for a city to thwart a property owner's lawful application for use of land consistent with the General Plan by

(a) widespread announcements of the city's intent to acquire the subject property,

(b) the various illegalities enumerated in Question 1, above, and then

(c) after the owner's proposed use of the subject property has been thus successfully thwarted, announce that it no longer intends to acquire such property?

4. Considering the totality of the facts found by the trier of fact[1] and considering the fact that as a result of his inability to proceed with the use of the subject property the owner lost his interest therein,[2] is it constitutionally permissible for a state court to deny any relief whatever on the theory that the unconstitutional purpose of the city may not even be injured into?

5. Where the totality of city's ostensibly regulatory events complained of by petitioner results in an irrevocable loss of his property interest, so that whatever property he had is irretrievably stripped from him by the City's acts done overtly with acquisition in mind, is it constitutionally permissible for a state court to hold unqualifiedly that no just compensation for such taking is ever permissible?[3]

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[1]The trial court's Findings of Fact are attached hereto as Appendix D.

[2]Petitioner was the owner of an option on the subject property, which is a customary way to acquire land for development in California (see *County of San Diego v. Miller*, 13 Cal. 3d 684, 692-693, 119 Cal. Rptr. 491, 496, 532 P. 2d 139 (1975)). As a result of the events at bar, petitioner's option ran out and he lost his interest in the subject property.

[3]This is the issue which this Court declined to reach in *Agins v. City of Tiburon*, ... U.S. .... (1980), but which is now pending on the merits before the Court in *San Diego Gas & Electric Co. v. City of San Diego*, No. 79-678. Unlike in *Agins*, petitioner in the case at bench exhausted his administrative remedies.

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Petitioner, Harold A. Toso, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Four, filed in this proceeding on February 6, 1980.

THE OPINIONS BELOW.

There are two opinions below. The first one is reported at 151 Cal. Rptr. 912. Following that decision, the California Supreme Court granted hearing and summarily remanded to the Court of Appeal for reconsideration in light of *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P. 2d 25, affirmed on other grounds, ... U.S. .... . Following such reconsideration, the Court of Appeal rendered its second opinion, reported at 101 Cal. App. 3d 934, 162 Cal. Rptr. 210.

JURISDICTION.

1. This is a civil action in which Plaintiff (Petitioner) contends that Defendant (Respondent) City of Santa Barbara effected an uncompensated taking, and deprivation of property without due process of law.

2. The judgment of the California Court of Appeal was rendered on February 6, 1980. Following denial of a timely petition for rehearing, Petitioner sought timely hearing by the California Supreme Court which extended time to consider the petition, and denied hearing on May 14, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "SECTION 1. No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

RAISING THE FEDERAL QUESTION.

The complaint alleged that the conduct of the defendants worked a de facto taking of Petitioner's property without compensation, in violation of the U.S. Constitution.

STATEMENT OF THE CASE.

A. Preliminary Statement.

The factual picture painted by the opinion below (see Appendix A) is anomalous. Although there is only one set of trial court findings of fact (see Appendix D), the California Court of Appeal rendered two opinions which treat the facts quite inconsistently. The first opinion (reported at 151 Cal. Rptr. 912) reviewed the findings of the trial court (see 151 Cal. Rptr. at 922) and concluded: "These activities [of the city], directed towards the acquisition of plaintiff's property, are not mere plot planning for future use. The activities of the government were direct, specific, active attempts to acquire the property, and it was reasonable for Toso and others to believe the purchase was imminent" (151 Cal. Rptr. at 923). The Court of Appeal then went on to conclude that the city conduct was sufficiently "unusual and extraordinary as to create a taking" (*Id.*). Said the Court: "In the case at bar the ballot proposition with its language calling for the purchase of the Wilcox property [the subject property] considered *in combination* with the city's failure to rezone in accordance with the plot plan for RH overlay, and considered with other conduct arranging for the purchase of the property, when viewed in its totality, provide such unusual or extraordinary activities, on the part

of the municipality'' (*Id.*, footnote omitted, emphasis the Court's).[4]

Following this decision, the California Supreme Court granted hearing (vacating the above opinion) and summarily remanded for reconsideration in light of its decision in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P. 2d 25 (1979). Upon such reconsideration, the Court of Appeal rendered its present opinion which completely changes the factual analysis and reaches *factual* conclusions and inferences opposite to those expressed in the first opinion, *even though the record and trial court findings of fact are the same*! To assist this Court in a ready comparison of the drastic transformation that this set of facts underwent between the first and second opinion, there is included with this Petition Appendix C which compares the facts as seen by the first and second opinions.[5]

B. Statement of Facts.

Since 1964, the General Plan of the City of Santa Barbara designated the subject property as ''resort hotel.'' In mid-1973 the city planning staff reexamined this designation and concluded there was no reason to change it.

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[4]In other words, the court below thus applied the same test as to what constitutes a taking effected by inequitable precondemnation activity as did this Court in *Agins v. City of Tiburon*, ... U.S. ....., fn. 9 (1980), and found the city actions to meet these taking criteria.

[5]Such comparison is important, because it provides another graphic illustration that California Supreme Court's decision in *Agins v. City of Tiburon*, *supra*,—unless corrected by this Court—signals not merely a change in remedies, but a denial of relief for regulatory takings altogether. This is a situation very much like *San Diego Gas & Electric Co. v. City of San Diego*, now pending before this Court as No. 79-678, where the landowner likewise proved a taking as a matter of fact, had the Court of Appeal affirm on the facts as so found, only to see the facts establishing the taking vanish in a second Court of Appeal [unpublished] opinion which refused to afford any relief whatever, following the *Agins* decision. See Jurisdictional Statement in No. 79-678, at pp. 13-14.

In February 1974, the subject property was zoned E-1 and R-1, both single-family residential designations, with resort hotel designation on the General Plan. Under the Zoning Ordinance, the resort hotel use of such property may be obtained where a specific proposed plan complies with the resort hotel ordinance requirements and the plat plan and perspective renderings and elevations are approved by the Planning Commission and City Council. The RH (resort hotel) overlay addition to the existing zoning and approval of the specific plan go together.

On November 30, 1973, petitioner Harold A. Toso ("Toso") agreed to purchase the subject property, which required him to prepare a development plan and then proceed with diligence to obtain all necessary approvals for development according to the plan. He had until January 15, 1977 to complete the purchase. Toso prepared a plan for a resort hotel, and on February 6, 1974, submitted it to the City Planning Commission for approval together with a request for the RH overlay zoning.

Toso's application inspired immediate activity on the part of groups of private citizens interested in putting the subject property to public park purposes, and adverse action on the part of various city officials interested in the same objective, hoping at first that the property would be eligible for State Park Bond Act funds if that act passed. The Community Service Director suggested that Toso's development be prevented until the November election to give the City time to value the property and to finance acquisition.

The public hearing on the environmental impact report concerning Toso's proposed development was held on May 10, 1974. One of the announced alternatives was city acquisition of the property. This included an estimate of land costs for park purposes and an overt statement that the city's

acquisition costs would be lower if Toso's proposal were blocked.

At the city council meeting of June 5, 1974, the Community Service Director reported that the city staff supported the acquisition and outlined methods for its financing. Toso's attorney advised the Council of his pending zoning application and urged it to decide one way or the other in order to remove the cloud of condemnation over the zone application proceedings. He suggested that the City obtain a good appraisal so the Council could determine (based on potential cost) whether it wanted the property or not.[6]

At a council meeting on June 11, 1974, the Council voted to accept the staff recommendation to commit a share of the 1974 State Bond Act funds allocated to the city and seek joint acquisition with the county. Toso's attorney again urged Council to get an appraisal so they would know the potential cost, and could make an informed decision.

On June 24, 1974, the State Director of Parks and Recreation wrote a letter advising the City Director of Community Services that state park bond funds would not be available for the 1974-75 fiscal year. The Council met again on July 9, 1974. By then the city's preliminary appraisal had been received but was not made public. The Council voted to abandon pursuit of State Bond Act funds for the project, and the staff was directed to report on other means of financing acquisition.

At the council meeting of July 23, 1974, the staff recommendation to place the acquisition before the voters as a bond issue was rejected. It was noted that the City had just received $4,000,000 by reason of a settlement of the

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[6]The city, however, refused to spend the money required to obtain a reliable appraisal and the Council voted to obtain a "preliminary" appraisal only.

City's suit for oil spill damages. Instead, the Council decided to place a referendum proposition on the November ballot as follows:

> "Shall the City of Santa Barbara purchase for open space purposes the approximately 65 acres of real property known as the Wilcox property, located immediately southeast of Arroyo Burro Beach?"

These events received extensive local publicity. Newspaper articles appeared announcing a special meeting of the City Council called to hear public comment on acquiring the property. The articles quoted one of the councilmen to the effect that a delay in the city's acquisition could result in values increasing from an estimated $1.1 to $1.3 million, to $3 or $4 million.

On August 5, a special council session called to hear public comment on the acquisition of the property was held. Toso's attorney again reiterated Toso's plea that a decision be made promptly, uring the Council to get an adequate appraisal and insert a dollar amount for the November ballot proposition, so that the electorate would be properly informed. He noted that comparable sales used in the City's own preliminary appraisal supported a value of $75,000 per acre.

The meeting adjourned with no action taken. This was the last truly public hearing before the City Council concerning the subject property. From that point on, the Council conducted virtually all of its discussions in secret "executive" sessions at the request of the City Attorney. The next day, August 6, 1974, the Council opened its regular meeting and then immediately recessed to "executive" session to discuss the property. When the Council reconvened in open session, it made clear that it would take no further action until after the November election, and that in the meantime

Toso would have to proceed with his zoning application under the cloud of city acquisition.

Simultaneously, the City Planning Commission was considering Toso's application. After several hearings, on October 17, the Planning Commission approved Toso's detailed site plan but denied his application for the RH overlay to the residential zoning. Members of the Planning Commission had attended council meetings at which the City Council had expressed its desire to acquire the property for a park.

On October 29 the City Council held another secret "executive" session to discuss "legal matters related to the Wilcox property."

On November 5, the electorate voted in favor of Proposition A, approving the acquisition. The day after the election the City Attorney inquired of Toso's attorney, and was told that Toso asked $57,000 per acre.[7] Thereafter, on the same day, the City Attorney once again called the Council into secret "executive" session to discuss the property, and advised the Council that if it meant to condemn the property, it should be done promptly, so as not to prejudice Toso's zoning application. The consensus of the Council was that it wanted no condemnation. However no decision was made not to acquire the property, and the consensus was kept secret.

On November 12, 1974, Toso's appeal from the Planning Commission's denial of the RH overlay zoning came before the Council. At the noon recess, and before the Toso matter came up on the agenda, one of the councilmen was interviewed on television and announced that the Council would "work hard" at getting the property. This was so even

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[7]Note that the city's own "preliminary" appraisal contained comparable sales data supporting a value of $75,000 per acre.

though in the secret executive session of November 5, Council had already decided not to condemn.

When the time came for hearing Toso's appeal the Council immediately recessed to "executive" session, as had become its custom in all matters concerning the subject property. Upon returning to public session, the City Attorney made a long statement for the record. He said the Council had discussed whether the vote of the people was a decision to purchase and concluded it was advisory only; that the Council was not prepared to purchase at its own preliminary appraisal figure; that the Council had not decided to purchase or acquire the property; that the Council would divorce itself from any desire to purchase the property and consider the zoning application on its merits. The hearing was continued to November 19, 1974. After a further continuance to November 26, the Council voted to deny Toso's appeal, in spite of compatibility of Toso's project with the General Plan, and in spite of the fact that his detailed site plan had been approved by the Planning Commission.

On January 7, 1975, the Council made two decisions in secret "executive" session: first, to reject Toso's compromise offer; and second, to communicate to Toso that they were not interested in the property and he was free to develop it as a residential subdivision. However, the Coastal Commission staff took a dim view of residential subdivision use on the subject property, preferring the resort hotel use proposed by Toso to any other use except a public park. Thus, Toso found himself caught between two governmental agencies with opposite ideas as to how the subject property was to be used.

In early 1975 Council removed from the General Plan the resort hotel designation for the subject property.

Toso's Complaint for Damages, for Inverse Condemnation, for Writ of Mandate and Declaratory Relief was filed February 21, 1975.

On August 5, 1975, shortly before the instant trial, another city council "executive" session was held concerning the subject property.

The City Attorney drafted Resolution 8111 and the Council approved it in "executive" session. Then in an open session the Resolution was adopted. Resolution 8111 declared that at the direction of the City Council representatives of the City attempted to negotiate an economically acceptable purchase price; that the price demanded by Mr. Toso was not acceptable; that the Council did not want to become involved in the uncertainties of a condemnation action; and that the City had no present or future intention to acquire the property and wanted the electorate to be fully informed of that fact.[8] Resolution 8111 also initiated proceedings to rezone the property to planned unit development use (PUD). The Planning Director was not consulted, and it is not customary in Santa Barbara for the Council to initiate zone changes. The City Administrator could not recall such procedure on any other occasion. On October 6, 1975, the same date on which trial commenced, the Planning Commission met in special session to pass the planned unit development zoning as requested by the City Council. PUD's were not acceptable in the market. There had never been a successful PUD development within a mile of the subject property. A planned unit development on a comparable site, Montecito Shores, had proved very unsuccessful economically.

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[8]Note that this was almost a year *after* the electorate voted to acquire the property.

According to uncontroverted expert testimony, as of November, 1974, absent the city's threat of public acquisition, the RH overlay zone change could have been routinely obtained, and the property had a market value of $4,700,000. By that same time, considering the failure of the Planning Commission and the City Council to zone in accordance with the General Plan, the public knowledge of the plans for public acquisition and its effect on the market, and the passage of the ballot proposition directing purchase, the property was good only for speculative holding. In this condition the Wilcox property had a market value of only $600,000.

The trial court found that the totality of actions by the City had a detrimental effect on the property, its value, its use, and its marketability; that the City Council intended that denial of Toso's application would prevent any development prior to City acquisition; and, that the City's paramount consideration at all times was the acquisition of the Wilcox property as open space or as a park.

The trial court further found that the Council's secret sessions were illegal,[9] that in those sessions Council members expressed ill-will toward Toso, his attorney and his appraiser, and had a personal bias against his interests. Moreover, the trial court found that it was the Council's intention in denying Toso's application to prevent any development of the subject property to facilitate its acquisition by the city for open space or as a park (the trial court's findings, appear in Appendix D).

The trial court concluded there was no taking or damaging under the Constitution for the reason that there was no

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[9]See Calif. Government Code §54953.

physical damage or total reduction in value[10] and, based upon such conclusion, made its judgment that Toso take nothing by his causes of action for inverse condemnation. However, the trial court also concluded Toso was entitled to judgment on his causes of action for non-monetary relief, invalidating Resolution 8111,the PUD zoning, as well as the removal of the RH designation from the General Plan, and mandating a grant of the RH zoning overlay.

An appeal followed.[11] While the appeal was pending, Toso's time to complete the purchase ran out, and he lost his interest in the subject property.

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[10]Such conclusions were legally erroneous; see *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *i.e.*, physical invasion is not required for a taking. (*Id.* at 122, fn. 25), and a taking may result from a substantial economic impact on the owner (*Id.* at 124) or from an unduly harsh impact upon the owner's right of user (*Id.* at 127).

[11]The City appealed that portion of the Judgment invalidating its regulatory activities and mandating the rezoning. Toso cross-appealed those portions of the Judgment denying relief in inverse condemnation. Toso's option expired January 15, 1977, during the pendency of the appeal, which rendered the equitable relief moot as to him as the City's activities thus stripped him of his interest. By its first opinion in this case the Court of Appeal reversed as to the invalidation remedies but held Toso was entitled to the inverse condemnation remedy. However, the first decision was vacated when the California Supreme Court granted the City's Petition for Hearing and the matter was remanded to the Court of Appeal for reconsideration in the light of *Agins v. City of Tiburon, supra.*) The second opinion of the Court of Appeal is now presented here for review (Appendix A).

REASONS FOR GRANTING THE WRIT.

A. Introduction.

If nothing else, this Court's recent docket bears striking witness to the fact that the so-called "taking issue" has assumed grave, nationwide proportions. It is an important, recurring issue whose more definitive resolution would further the interest of judicial administration (cf. *Carlson v. Green*, · · · U. S. · · · [64 L. Ed. 2d 15, 22, fn. 2])[12]

The case at bench presents the Court with a full exhaustion of administrative remedies, as well as with a fully developed trial record, including express findings of fact that the city's conduct in this case was a saga of denial of due process, motivated by officials' bias and ill-will toward Petitioner, and intended to prevent him from using his property, so as to facilitate supposed acquisition by the city. Petitioner has, as a result, lost his interest in the subject property; he has

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[12]This Court's commitment to an ad hoc, case-by-case approach to this issue (see *e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124 (1978), *Kaiser Aetna v. United States*, ... U.S. .... [100 S. Ct. 383, 390] (1979), combined with the relatively low frequency with which this Court has considered such matters, and the judicial reluctance to address the substantive issues (see *e.g., Agins v. City of Tiburon*, ... U.S. .... (1980), *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962), *Jankovich v. Indiana Tollway Commission*, 379 U.S. 487 (1965); and see *Chrongris v. Corrigan*, 409 U.S. 919 (1972)) have been causative factors in the development of much widespread indecisive litigation which consumes enormous amounts of the parties' and lower courts' time and resources, so far without any definitive constitutional rulings capable of providing reliable guidance to parties in future controversies. Moreover, there has evolved a diffuse and often contradictory body of decisional law, whereby different state courts take diametrically opposite views in construing federal constitutional guarantees against deprivation of property. One commentary has termed the situation an absence of rules, Annotation, Supreme Court's Views as to What Constitutes "Taking" Within Meaning of Fifth Amendment's Command That Private Property Not be Taken for Public Use Without Just Compensation," 57 L. Ed. 2d 1254, 1258. See Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 2-3 (1970).

been irrevocably stripped of what he had.[13] Thus, in addition to addressing a grave issue, ripe for decision, this petitioner also seeks the redress of a flagrant injustice.

B. The Ruling Below Definitively Demonstrates That There Is No Practical Remedy Available to California Landowners Whose Property Has Been Taken by Confiscatory Regulations.

The subject of remedies (*i.e.*, whether in regulatory takings just compensation can be denied altogether, relegating the aggrieved landowner to invalidation of the regulation, as the sole remedy) was extensively briefed before this Court in *Agins v. City of Tiburon, supra*, by the parties and a host of *amici*, and will no doubt be briefed again in *San Diego Gas & Electric Co. v. City of San Diego*, No. 79-678. Petitioner accordingly respectfully invites the Court's attention to such briefing[14] in the interest of brevity and to avoid repetition here.

However, the case at bench adds a constitutional dimension going far beyond *Agins* and *San Diego Gas & Electric*. This is so, because this is the first California post-*Agins* case in which the aggrieved landowner did seek *and obtained* [from the trial court] the vaunted remedy of invali-

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[13]The case at bench thus adds to a growing list of California cases in which landowners are hamstrung by a maze of "regulations," so that they are deprived of all economically viable use of their land and as a result lose it. See *e.g. Jacobson v. Tahoe Regional Planning Agency*, 566 F. 2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti v. Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978), *Hollister Park Investment Co. v. Goleta County Water Dist.*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 2d 736, 141 Cal. Rptr. 820 (1977). Also see, *Klopping v. City of Whittier*, 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972), *County of Los Angeles v. Berk*, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P. 2d 381 (1980), now pending before this Court on Petition for Certiorari as No. 79-1950.

[14]See No. 79-602, Appellant's Brief at pp. 31-55, and Appellant's Reply Brief at pp. 4-21.

dation, only to have it taken away by an appellate holding that hereafter makes it practically impossible to obtain such a remedy. In the process the court below laid down a rule that defies this Court's holdings in *Nectow v. Cambridge*, 277 U.S. 183 (1928) and in *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977).

Nectow teaches that (while ordinarily courts will defer to the judgment of zoning authorities—277 U.S. at 188), where a trier of fact determines on the evidence that the restriction in issue does not promote public health, safety, convenience and general welfare, but instead deprives the owner of practical use and an adequate return (277 U. S. at 187), the regulation is invalid. Here, the findings are replete with determinations of bias and ill-will toward the landowner, and denial of due process, all avowedly aimed at the improper purpose of facilitating cheaper acquisition of the subject property by the city.[15] Thus, the decision below on its face defies the substantive holdings of *Nectow*.

Moreover, the problem goes beyond that. If *Nectow* is to have any meaning whatever as a constitutional precedent (see 277 U.S. at 188-189), a party must have an opportunity to show the constitutionally improper purpose operating behind the *ostensibly* benign face of the ordinance.[16] This Court dealt explicitly with that issue in *Arlington Heights v. Metro. Housing Corp., supra*, with results that leave no room for argument:

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[15]This Court has held repeatedly that governmental efforts at decreasing land values prior to contemplated acquisition are improper (see *United States v. Virginia Electric P. Co.*, 365 U.S. 624, 625 (1961), *United States v. Reynolds*, 397 U.S. 14, 16 (1970)), and being constitutional violations (*Id.*) cannot constitute proper governmental objectives to which the courts must defer.

[16]That has been the law since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

> "When there is proof that a discriminatory purpose has been a motivating factor in the [zoning] decision, this judicial deference [to zoning determinations] is no longer justified.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands sensitive inquiry into such circumstantial and direct evidence as may be available." 429 U.S. at 266-277, footnote omitted.

The Court went on in *Arlington Heights* to note the significant evidentiary criteria in language that may as well have been written for the instant case:

> "For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 429 U.S. at 267, footnotes omitted.

That is exactly what happened at bench: the subject property was designated by the General Plan for hotel use since 1964, and this designation was reaffirmed in mid-1973 by the city's planning staff. But a scant few months later (in November 1973), when Toso applied for that very use, everything suddenly changed, and virtually all city substantive policies and procedures were disregarded in a frantic effort to keep him from using the property.[17]

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[17]Aside from the secret Council sessions, bias and conflict of interest, the zoning of the subject property was suddenly changed by an *ad hoc* "procedure" never before used.

Yet the court below laid down a rule that purports to insulate local land regulatory agencies from the *Arlington Heights* constitutional review. It held instead that if *any* reasonable basis for the zoning decision can be conjured up, it is proper to ignore the invidiously discriminatory or otherwise unconstitutional purposes of the zoning authorities—that the latter may not even be inquired into! That holding reduces *Arlington Heights* to a glittering platitude, and issues a carte blanche to California zoning bodies to discriminate or otherwise act unconstitutionally with impunity, as only their ostensible (not true) purpose may be inquired into. See Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 23 Maine L. Rev. 29 (1980).

Beyond that, such holding effectively obliterates the distinction between facial and applied constitutionality: as long as the purposes stated on the face of the zoning ordinance are characterized as "reasonable" no inquiry may be made into their true purpose. This also vitiates this Court's holdings in *Agins*. That holding is that an aggrieved landowner must apply for land use permission before he may challenge the ordinance as applied. The opinion below, however, makes such a procedure an exercise in futility: the aggrieved owner, after suffering the expense and delay of a fruitless permit pursuit, comes to court, only to be told that the unconstitutional purpose of the zoning authority may not even be inquired into, and once again he is limited to an act of wooden obeisance to the ordinance's ostensible—not actual—purpose.[18]

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[18]In the case at bench there are ample findings of bias and ill-will specifically toward Petitioner. Yet, the court below never even considered their constitutional implications.

In sum, this Court is confronted with clear indication that the language of *Agins* notwithstanding, there are no invalidation remedies to be had in California for confiscatory regulation, and none have been reported in almost two decades.[19] Intervention by this Court is urgently needed if the constitutional protection against confiscation is to retain any reality.

C. The Law Controlling Governmental Interference With Private Property in Contemplation of Its Acquisition, Is in a State of Confusion.

The use of ostensible "regulations" to stultify reasonable land uses, thereby depressing values and facilitating governmental acquisition plans (which may or may not materialize) is approaching epidemic proportions, as are *de facto* takings effected by such governmental conduct. This Court's guidance in this controversial constitutional area is badly needed because the Court has never addressed this issue on the merits.[20]

Although once rare (see *e.g., Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P. 2d 10 (1965)), the use of elaborate regulations to stultify economically rational uses of land which the local government wishes to acquire is growing. See *e.g., United States v. Certain Lands in*

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[19]The last California case that actually invalidated a zoning ordinance as confiscatory, was *Hamer v. Town of Ross*, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 283 P. 2d 375 (1963).

[20]But see dicta in *United States v. Virginia Electric P. Co.*, 365 U.S. 624, 625 (1961) and *United States v. Reynolds*, 397 U.S. 14, 16 (1970), indicating that the government may not depress values and then acquire at depressed values. See 42 U.S.C. §4651 (3). Also see *Agins v. City of Tiburon*, ... U.S. ...., ... fn. 9 (1980), where the Court noted that good faith municipal precondemnation planning, ". . . absent extraordinary delay . . .," is not a taking. Here, however, there are ample findings that the city did not act in good faith; its acts were motivated by ill-will to Petitioner, and by a desire to use the regulatory process to facilitate its then-planned acquisition.

Truro etc., 476 F. Supp. 1031 (1979, D. Mass.), *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 845 (1969), *Maxey v. Redevelopment Authority*, 288 N.W. 2d 794 (1980, Wis.), *City of Austin v. Teague*, 570 S.W. 2d 389 (1978, Tex.).

The tactic often used in such cases, as in the case at bench, is to grandly announce plans for governmental acquisition, which is widely publicized and, naturally, causes the market to shun the to-be-acquired property (particularly when it is also "regulated" into unusability—see *Benenson v. United States*, 548 F. 2d 939 (1977, Ct. Cl.), *Jones v. People*, 22 Cal. 3d 144, 148 Cal. Rptr. 640, 583 P., 2d 165 (1978), *Madison Realty Co. v. Detroit*, 315 F. Supp. 367 (1970, E.D. Mich.)), and then fail to carry those plans through, while the affected landowners languish with useless land that burdens them with carrying costs while providing neither income nor utility. See *e.g., Benenson v. United States, supra, Drakes Bay Land Co. v. United States*, 424 F. 2d 574 (1970, ct. cl.), *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F. 2d 784, 787 (1979, 8th Cir.), *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency*, 561 F. 2d 1327 (1977, 9th Cir.), *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A. 2d 408 (1975, N.J.), *Jones v. People, supra. City of Austin v. Teague, supra.*[21]

The legal problem is that while some courts provide remedies in such cases (see cases collected *supra*), others do not, and permit local governmental entities to misuse their

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[21]A particularly virulent variant of such tactics occurs where a condemnation action is actually bought, then abandoned, while leaving the affected property under continued cloud of acquisition. See *e.g. Foster v. Detroit*, 254 F. Supp. 655 (1966, E.D. Mich.), affirmed 405 F. 2d 138 (1968, 6th Cir.), *Klopping v. City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972). And see *Lomarch Corp. v. City of Englewood*, 237 A. 2d 881 (19 ...., N.J.).

regulatory powers to thwart private land uses in anticipation of acquisition. See e.g. *Southpark Square Ltd. v. City of Jackson*, 565 F. 2d 388 (1977, 5th Cir.).

Some states have gone so far as to ignore even this Court's views expressed in *Virginia Electric* and *Reynolds, supra*, and permit their condemning agencies to use their powers to depress values by such precondemnation activities, and then acquire at depressed values. See *Chicago v. Loitz*, 329 N.E. 2d 208 (1975, Ill.), *Bakken v. Montana State Highway Comm.*, 382 P. 2d 550 (1963, Mont.). Some states follow this constitutionally impermissible approach under circumstances that can only be described as draconian. See *City of Gary v. Ruberto*, 354 N.E. 2d 786 (1976, Ind. App.), *Fram v. Boston*, 292 N.E. 2d 356 (1973, Mass.)

Perhaps more importantly, there exist vigorous disagreements between states as to what constitutes a *de facto* taking within the meaning of the Fifth Amendment, in the context of announced governmental intent to acquire private land, that prevents the owner from rational use thereof. See *e.g.*, *Lincoln Loan Co. v. State*, 545 P. 2d 105, 109-110 (1976, Ore.), which expressly disagrees on this point with New York and Illinois.

Similarly the courts of New Jersey (*Washington Market Enterprises, Inc. v. City of Trenton*, 343 A. 2d 408 (N.J. 1975)), Connecticut (*Textron, Inc. v. Wood*, 355 A. 2d 307 (Conn. 1974)), and Washington (*Lange v. State*, 547 P. 2d 287 (Wash. 1976)) have declined to follow the rule announced by New York (*City of Buffalo v. J. W. Clement Co.*, 28 N.Y. 2d 241, 269 N.E. 2d 895 (1971)), on what constitutes a *de facto* taking effected by precondemnation activities.

In sum, pertinent constitutional law is in utter disarray, with rules varying haphazardly from state to state, even

though they all purport to be construing the Fifth Amendment's guarantee against uncompensated *de facto* takings. Intervention by this Court is urgently needed to provide some measure of coherence to this neglected area of constitutional law.

CONCLUSION.

It is both in the interest of justice and of sound constitutional law that the Court address the issue of regulatory deprivation of land uses, effected with acquisition in mind. *A fortiori*, the case at bench cries out for relief in light of the trial court's ample findings of bias and ill-will toward the Petitioner, which—together with the city's acquisitory plans—were instrumental in denial of lawful land use to Petitioner, and eventually in his loss of the property.

Petitioner prays that the writ issue.

Respectfully submitted,

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Attorney for Petitioner.

Of Counsel:

HENRY K. WORKMAN.
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GERALD PARENT.

APPENDIX A.

Second Opinion of the California Court of Appeal.

Harold A. Toso et al., Respondents and Cross-Respondents, vs. The City of Santa Barbara et al., Appellants and Cross-Respondents. Civ. 49261.

Court of Appeal, Second District, Division 4.

Feb. 6, 1980.

KINGSLEY, Acting Presiding Justice.

This is an action filed by Toso individually and as agent of others against the City of Santa Barbara and all members of the city council who held office during the year 1974. The first cause of action seeks inverse condemnation damages under section 1246.3 of the Code of Civil Procedure (now § 1036); the second cause of action seeks damages for inverse condemnation; the third cause of action seeks a writ of mandate to compel the city to grant to Toso a rezoning of the property involved; the fourth claim is in mandamus (Code of Civ. Proc., § 1085); and the fifth cause of action seeks declaratory relief. After a trial judgment was entered for the defendants on the first two causes of action and in favor of plaintiffs on the third, fourth, and fifth causes of action. The effect of the judgment in favor of plaintiffs was to vacate the proceedings hereinafter discussed that denied Toso a requested rezoning and to order the city to grant the rezoning requested.

The city has appealed from the judgment against it on the third, fourth, and fifth causes of action; Toso has appealed from the judgment against the plaintiffs and in favor of the city on the first and second causes of action.

While this appeal was pending, the plaintiffs other than Toso secured orders substituting themselves as parties appellant in place of Toso acting as their agent. The substituted

parties then requested dismissal of the cross-appeal insofar as they were involved and we entered our order of dismissal in accordance with that request. As a result of those proceedings, we now have before us the city's appeal and a cross-appeal by Toso as an individual. We reverse the judgment adverse to the city on the third, fourth and fifth causes of action; we affirm the judgment in favor of the city on the first cause of action. We affirm the judgment in favor of the city on the second cause of action.

At the time of the events herein involved, Toso had an option to buy from his co-plaintiffs a tract of land in the City of Santa Barbara known as the Wilcox property. It was his desire and intent to develop that property as a resort hotel. The result of the events hereinafter described was that his request to rezone the property for that purpose was denied and in January of 1977, he allowed the option to expire unexercised.

In 1964, the City of Santa Barbara adopted a general plan showing the Wilcox property as a resort hotel with five dwelling units per acre. In 1965, the city zoning ordinance was amended to add a chapter providing for a resort hotel zone land zoned as RH also zoned as single and multiple family residential zone. The Santa Barbara zoning ordinance provides for zone changes by zoning amendments. The zoning ordinance provides for appeal to the city council and a public hearing following the denial of an application for a zone change.

Prior to Toso's application for rezoning, the city had permitted certain other property belonging to another person to be rezoned to RH zoning. This property which was granted rezoning already had a resort hotel on the premises. However, the city had also denied an RH rezoning application to W. Von Biskupsky, who wanted to build a resort hotel across the street from the Wilcox property. The city

also denied the application to zone Loma Hacienda property for a resort hotel. The property surrounding the Wilcox property was zoned R-1 for single family residences at the time of plaintiff's rezoning application.

Toso knew that the city's general plan provided for a resort hotel on the Wilcox property when he secured the option to buy the property in 1973. In January of 1974, the city's environmental officer advised the City Park Director of an incipient movement to purchase the Wilcox property for a park. In February of 1974, Toso filed a rezoning application to change the zoning on the Wilcox property from E-1 and R-1 single family residences to RH resort hotel.

Citizens met with the Park and Recreation Director to discuss the purchase of the Wilcox property as a park and, sometime after that the city had the Wilcox property appraised for value. After the City of Santa Barbara received a sum of money for settlement of an oil spill, the city on July 23, 1974, placed the following proposition on the November 1974 ballot: "Shall the City of Santa Barbara purchase the Wilcox property for open space use?" The planning commission had several meetings on Toso's rezoning application. While they found the resort hotel plot plan aesthetically satisfactory, they denied Toso's application for resort hotel rezoning, finding that a commercial hotel in a single family area was an improper land use.

By a small majority, the voters in Santa Barbara approved the proposition favoring purchase of the Wilcox property, and the city attorney began negotiations with Toso's attorney for the purchase of the property.

Toso appealed the denial of the resort hotel rezoning application and, prior to the public hearing, the city council met in executive session with the city attorney to receive

legal advice from him. A statement was prepared as a result of those sessions stating that the city council would divorce consideration of respondents' appeal on rezoning from the city's desire to purchase the Wilcox property. A public hearing was then held and respondents' rezoning application was once again denied.

The city attorney met with the city council and decided to inform Toso's attorney that the city was not interested in the property and that he was free to develop it as a residential subdivision. On February 3, 1975 the city attorney advised Toso's attorney that the city did not intend to condemn the property.

Toso then filed his complaint in inverse condemnation, damages and writ of mandate. The city attorney met with the city council to prepare a draft of a resolution. Afterwards, the city council adopted Resolution 8111 stating nonintention to acquire the Wilcox property. The resolution also initiated proceedings to consider rezoning the property for a Planned Unit Development (PUD).

Trial in the action began. The planning commission approved rezoning of the Wilcox property to E-3 PUD and E-1 PUD, which allowed either single subdivision or a planned unit development residential project.

THE CITY'S APPEAL

The discussion below deals first with the city's appeal from that portion of the judgment that is not in its favor, including the order of the court to the city council to rezone the Wilcox property to permit a resort hotel.

I.

Appellant city's first argument is that the trial court erred in determining that the city council's denial of respondent's rezoning application was a quasi-judicial act reviewable

under Code of Civil Procedure section 1094.5 rather than an act reviewable under Code of Civil Procedure section 1085. We agree. Toso, by his own language, sought to have the Wilcox property "rezoned" and he submitted a "rezoning" application for that purpose. Although, a decision granting a variance, a conditional use permit, or an exception to use is an administrative act, a decision on an application for rezoning is a legislative act. (*Tandy v. City of Oakland* (1962) 208 Cal.App.2d 609, 611, 25 Cal.Rptr. 429; *Topanga Assn. For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 513, 113 Cal.Rptr. 836, 522 P.2d 12; *Banville v. County of Los Angeles* (1960) 180 Cal.App.2d 563, 570, 4 Cal.Rptr. 458.) Rezoning is accomplished by amendment of a zoning ordinance and by the same procedure as the original enactment, and a city council's act in amending a zoning ordinance to exclude previously included property is a legislative and not administrative act. (*Johnson v. City of Claremont* (1958) 49 Cal.2d 826, 834, 323 P.2d 71.) Therefore, the court below erred in its conclusion that the denial of Toso's rezoning application was a quasi-judicial act rather than a legislative act.

The trial court below then exacerbated this error by applying Code of Civil Procedure section 1094.5 rather than Code of Civil Procedure section 1085 as a method of review. Review under Code of Civil Procedure section 1094.5 is not available where an agency is acting in a legislative capacity. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35, 112 Cal.Rptr. 805, 520 P.2d 29.) Zoning is a legislative act reviewable under ordinary mandamus under Code of Civil Procedure section

1085.[1] (*Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 137 Cal.Rptr. 304.)

II.

Appellant city's second contention is that the trial court erred when it substituted its judgment for that of the city council by ordering the city council to apply resort hotel zoning to the Wilcox property, and by finding that the Planned Unit Development zoning for the Wilcox property was null and void. Again, we agree with appellant city. In this state, courts generally refuse to overturn the legislative bodies' refusal to rezone. (*Tandy v. City of Oakland, supra,* 208 Cal.App.2d 609, 25 Cal.Rptr. 429; *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461, 202 P.2d 38; *Sladovich v. Fresno* (1958) 158 Cal.App.2d 238, 322 P.2d 565.) Denial of rezoning will be held valid unless there is no reasonable relation to the public welfare; and, before the courts will interfere with a zoning ordinance, the plan must be arbitrary.[2] (*Lockard v. City of Los Angeles, supra,* 33 Cal.2d 453, 461, 202 P.2d 38.) The sole issue on review of a zoning ordinance is whether or not there is any reasonable basis to support the legislative determination of the governing body, and the appellate court is not bound by the findings of the trial court if the record shows the question is debatable. (*Ensign Bickford Realty Corp. v. City Council, supra,* 68 Cal.App.3d 467, 137 Cal.Rptr. 304.) In zoning cases, findings of the trial court that property is suitable only for certain purposes is not controlling and the appellate

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[1]*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 5, 125 Cal.Rptr. 365, 542 P.2d 237 states that the remedy for discriminatory zoning is also under Code of Civil Procedure section 1085. But see *Sladvich v. County of Fresno* (1958) 158 Cal.App.2d 230, 322 P.2d 565.

[2]The suggestion that zoning decisions by local zoning bodies are presumptively valid under all circumstances has been criticized in *Fasano v. Bd. of Co. Commissioners* (1973) 264 Or. 574, 507 P.2d 23.

court will reverse where the lower court substitutes its judgment for that of the local legislative body. (*Lockard v. City of Los Angeles, supra*, 33 Cal.2d 453, 462, 202 P.2d 38.)

In the case at bar, the lower court improperly substituted its judgment for that of the local legislative body on the issue of the propriety of resort hotel zoning for the Wilcox property. Since it appears that the reasonableness of the Santa Barbara City Council's zoning ordinance prohibiting a resort hotel was at the very least debatable and since a zoning ordinance is presumptively valid (see *Ensign Bickford Realty Corp. v. City Council, supra*, 68 Cal.App.3d 467, 137 Cal.Rptr. 304), the trial court below erred in ordering the city council to rezone the Wilcox property to permit a resort hotel. Also, since the Wilcox property is surrounded by other property zoned for single family residences, and since another property owner who had property across the street from the Wilcox property also had his application to rezone for a resort hotel turned down, we can not say that the zoning bodies' conduct herein was unreasonable.

III.

Appellant argues that, even if administrative mandamus under Code of Civil Procedure section 1094.5 was the proper remedy, the court improperly applied its independent judgment in reviewing the matter before it. As we have said before, it is our opinion that Code of Civil Procedure section 1085 was the proper remedy and not Code of Civil Procedure section 1094.5. Nevertheless we have answered the city's contentions in this matter.

A property owner acquires no vested right as against future zoning merely by purchasing real property (*Anderson v. City Council* (1964) 229 Cal.App.2d 79, 40 Cal.Rptr. 41), and by zoning the property the government makes no

representation to the landowner that he will be exempt from the zoning laws in effect at the time he applies for his permit. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546.) Since the landowner had no vested right in the continuance of the zoning ordinance, even in a review under Code of Civil Procedure section 1094.5, the trial court is confined to evidence received by the administrative body, and the court may not reweigh the evidence. The court may only consider whether there is substantial evidence to sustain the finding. (See *Rapp v. Napa County Planning Com.* (1962) 204 Cal.App.2d 695, 697, 22 Cal.Rptr. 643.) Therefore, even if Code of Civil Procedure section 1094.5 had been the proper remedy, the trial court would not have been free to substitute its judgment.

IV.

Appellant argues that, even assuming administrative mandamus was the proper remedy, the trial court erred in concluding that the city council abused its discretion. Appellant first asserts that the trial court erred in concluding that the city council did not proceed procedurally in the manner prescribed by law. The findings do not show procedural violations, and there is no showing of abuse of a discretion.

V.

Appellant argues that the court erred in concluding that the city council's decision is not supported by the findings of the planning commission. The planning commission had several reasons to support its decision that the Wilcox property should be rezoned to be a resort hotel. They believed a resort hotel would be an objectionable intrusion into a residential area and would cause an unwarranted decentralization of the motel-tourist industry. Thus, there is sub-

stantial evidence to support the decision of the city council to deny respondent rezoning application and the court below erred in this finding.

VI.

Appellant argues that the court erred in concluding there was no substantial evidence to support the city council's decision to deny the rezoning application. There was testimony in the record that use as a resort hotel was inconsistent with family residential purposes and this was in itself substantial evidence to support the city council's decision to deny rezoning.

VII.

Appellant argues that, assuming that administrative mandamus was the proper remedy, the trial court erred in concluding that the city council did not grant respondent a fair trial. Respondent stipulated that there had been no procedural due process violations, and there is no showing that the procedure itself was improper or unfair.

VIII.

Appellant argues that the trial court erred in considering the motives or intentions of the city council in acting upon respondents' rezoning application.[3] We agree. The motives of city officials in passing on a zoning ordinance have long been held irrelevant to any inquiry concerning the reasonableness of that ordinance (*McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, 264 P.2d 932; *Ensign Bickford*

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[3]Finding 21 and Finding 22 read:

"21. Defendant City Council intended that denial of plaintiff's application would prevent any development of said property prior to defendant's acquisition of the property.

"22. Defendants' paramount consideration at all times was the acquisition of the Wilcox Property by a public agency as open space or as a park."

Realty Corp. v. City Council, supra) except where the ordinance was not passed in a lawful manner (*Kissinger v. City of Los Angeles* (1958) 161 Cal.App.2d 454, 327 P.2d 10) or where there is a claim of spot zoning. (*Smith v. County of Santa Barbara* (1966) 243 Cal.App.2d 126, 130, 52 Cal.Rptr. 292.) Although there is some suggestion (*Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 131 Cal.Rptr. 633) that the court may consider motives where the purpose of the zoning was to reduce the value of the property to acquire the property more cheaply, the case of *Viso v. State of California* (1979) 92 Cal.App.3d 15, 24, 154 Cal.Rptr. 580 recently stated otherwise. In *Viso*, plaintiff alleged that the purpose of the restrictive zoning was to reduce value of property for subsequent acquisition at reduced values. The *Viso* court cited the general rule that purpose or motive of the agency passing an ordinance is irrelevant since the validity of the ordinance rests not on subjective motivation but on objective effect.[4]

Furthermore, although there are numerous findings in the case at bar to suggest bad faith and improper motives,[5] there is no finding that the purpose of the city's denial of plaintiff's application to rezone was to reduce the value of the property for the subsequent acquisition at reduced values. Without that particular kind of bad faith or improper motive, the "notable exceptions" of the *Pinheiro v. County of Marin* case, *supra*, that would permit an examination into motives, would not apply even if that exception is still valid. Therefore, the general rule that motives should not be inquired

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[4]The *Viso* case does not take note of the notable exception in *Pinheiro* that permits an examination into motives where the purpose of the zoning was to reduce or freeze value so the property can be bought at a reduced price.

[5]See footnote 3, *supra*.

into should properly apply here, and the city's motive in denying the rezoning application is irrelevant.

IX.

Appellant argues that the trial court erred in concluding that the planning commission's approval of respondent's resort hotel plot plan required the city to rezone the property for a resort hotel.

The approval of a plot plan did not require rezoning. (See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546.)

X.

In light of our conclusion that the trial court erred in directing a rezoning, we need not, and do not, consider the city's further contentions that the trial court erred in requiring testimony concerning the discussions between the council and the city attorney. We also need not, and do not, discuss the city's attack on certain findings by the trial court.

THE APPEAL OF TOSO

Toso has appealed from the denial of his claim for money damages. The facts relevant to that appeal are as follows:

Although, in 1974, the Wilcox property was zoned for single family residences, the general plan showed a resort hotel symbol, and at that time the property was worth $4,700,000. Toso entered into an agreement to purchase the Wilcox property, and submitted to the city an application for RH overlay zoning. After that, city officials and various citizens groups began looking into purchase of the Wilcox property for a park. The Environmental Impact Report had the following statement: "If the approval is not obtained for that development, it may be expected that land costs will drop considerably, one estimate of cost if development

is denied, at from $500,000 to $730,000, or from $7,692 to $15,538 per acre." Environmental groups continued to urge the city to purchase the Wilcox property for a park, appraisals on the property were arranged, and the Director of Recreation and Parks said funds would be available for its purchase in 1975-1976. The rezoning application came up for a hearing, and the council voted to place the proposition calling for the purchase of the Wilcox property on the ballot in the next election. One of the councilmen urged immediate acquisition of the property on the grounds that waiting may increase the price. The city attorney asked Toso's attorney for the price of the property. A hearing was held on the denial of Toso's application for RH overlay zoning. The council in executive session decided Toso's asking price was too high. In a meeting, the city attorney said the vote of the people on the decision to purchase the Wilcox property was advisory only and not binding on the city. The city attorney said that the council could divorce itself from any desire to purchase property for a park, and could consider the matter of the zoning application on its merits. The city then told Toso they were no longer interested in buying the Wilcox property and that he was free to develop it as a residential subdivision. The city attorney dictated Resolution # 8111 which rezones the Wilcox property to a Planned Unit Development. Toso alleges that the zoning change to PUD caused the property's value to diminish to $600,000.

1.

Since the judgment in this case, the Regional Coastal Commission refused to accept Toso's application to proceed with the inn, and Toso's option to purchase the property has expired. Therefore, the lower court judgment ordered the

city to rezone the Wilcox property was of no value to Toso, since he does not own the property. The mandamus portion of the judgment is therefore of no interest to Toso.

II.

Cross-respondent city argues that the appropriate remedy for arbitrary discriminatory zoning is mandamus, not inverse condemnation. Plaintiff may properly test the invalidity of a discriminatory zoning ordinance in an action for declaratory relief. (*Viso v. State of California* (1979) 92 Cal.App.3d 15, 22, 154 Cal.Rptr. 580; *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667 at 678, 146 Cal.Rptr. 687) or a mandamus action (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 253, 146 Cal.Rptr. 428; *Friedman v. City of Fairfax, supra.*) ". . . [I]nverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 275, 157 Cal.Rptr. 372, 376, 598 P.2d 25, 29.)

However, as we shall discuss in some detail later, a plaintiff may still properly sue for damages in inverse condemnation where he alleges and proves unreasonable precondemnation activities. And in the case at bar, Toso is alleging that there was unreasonable precondemnation activities; he is not claiming arbitrary, discriminatory or spot zoning.

Toso also acknowledges that the particular zoning ordinance herein would not deprive the landowner of substantially all reasonable use of the property, such that the landowner would be entitled to declaratory relief under *Agins v. City of Tiburon, supra,* and therefore we do not discuss this issue further.

III.

The city argues that the fact that Toso failed to execute his option to purchase the Wilcox property does not affect the issue of whether the city's actions constitute a compensable taking. It is true that mandamus is of no use to Toso now, since he no longer has an existing interest in the property. Damages in inverse condemnation may nevertheless be available in a zoning action where a city's unreasonable precondemnation activities, during the period of time that plaintiff holds an option, cause plaintiff to allow his option to expire.

We acknowledge that in the *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 140 Cal.Rptr. 690, the court held that relief is properly denied where plaintiff's option expired prior to the filing of a condemnation action. However, that case would not necessarily preclude an option holder from showing that these were unreasonable precondemnation activities while he held the option. In *City of Walnut Creek* it was stated that there was no improper act of the city that led to the abandonment of the option (73 Cal.App.3d at 623, 140 Cal.Rptr. 690.) By inference from that language, if a plaintiff can show that he abandoned his option because of the improper precondemnation conduct of the city, he should not be precluded from obtaining damages because he no longer holds the option. If the city's improper precondemnation activities constitute a de facto taking during the period that the option was valid, the date of the taking in condemnation is not the date of filing, but the date of the improper conduct that amounted to the de facto taking. The *City of Walnut Creek* case merely held that that city's actions did not amount to a de facto taking during the option period. That case did not hold that a city's actions *could* not amount to conduct under any other circumstances.

IV.

Toso argues that the court improperly applied to a standard of physical taking or total uselessness of the zoned property as the standards necessary for finding a taking for damages for inverse condemnation. The court drew the following conclusions of law:

"3. The actions, activities and decisions of the defendants, involving the Wilcox Property since February 6, 1974, did not result in a physical damaging of said property (as distinguished from market value depletion and marketability) as contemplated by the California Constitution, Article One, Section Nineteen (then Section Fourteen)." A zoning ordinance that completely destroys the value of property can only be challenged by an action for declaratory relief or mandamus, and a plaintiff can not recover on the theory of inverse condemnation so as to transmute an excessive use of the police power into a lawful taking for which damages must be paid. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25.) Therefore, even if the court applied the standard of physical damage erroneously, Toso could not have been hurt thereby, since he was not entitled to money damages in inverse condemnation. The only remedy for deprivation of use of substantially all the property is to have the offending ordinance declared unconstitutional in an action for mandamus or declaratory relief; and the remedy of money damages in inverse condemnation is not available.

Whether there was a mere diminution in market value (*Brown v. City of Fremont* (1977) 75 Cal.App.3d 141, 142 Cal.Rptr. 46; *Sierra Terreno v. Tahoe Regional Planning Agency* (1978) 79 Cal.App.3d 439, 144 Cal.Rptr. 776) or whether a zoning deprived a landowner of substantially all all use, a landowner may not sue for damages in inverse

condemnation. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25.)

However, in the case at bench, Toso does not claim that he was deprived of substantially all value of his land by the failure to upzone so as to be entitled only to a remedy in mandamus or declaratory relief. (*Agins v. City of Tiburon, supra.*) Plaintiff does claim that there were inequitable precondemnation activities which entitles him to damages in inverse condemnation.

In footnote 14 in *H.F.H. Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516, 517, 125 Cal.Rptr. 365, 371, 542 P.2d 237, 243, the court stated that inequitable zoning actions undertaken by a public agency as a prelude to public acquisition could result in damages.[6] The City of Santa Bar-

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[6]Footnote 14 from *H.F.H. Ltd.* reads as follows:

"Neither *Selby* [*Realty Co. v. City of Buenaventura*, 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111] nor this case presents the distinct problems arising from inequitable zoning actions undertaken by a public agency as a prelude to public *acquisition* (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345; *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, 77 Cal.Rptr. 391); or from zoning classifications invoked in order to evade the requirement that land *used* by the public must be acquired in eminent domanin proceedings (*Sneed v. County of Riverside* (1963) 218 Cal.App.2d 205, 32 Cal.Rptr. 318). Thus in *Klopping* the city in question made public announcements that it intended to acquire the plaintiff's land, then unreasonably delayed commencement of eminent domain proceedings, with the predictable result that the property became commercially useless and suffered a decline in market value. We held only that the plaintiff should be able to include in his eminent domain damages the decline in value attributable to this unreasonable precondemnation action by the city. The case thus in no way resembles the instant one, in which plaintiffs made no allegations that the city intends to condemn the tract in question.

"Similarly in *Peacock* the county had refused to permit any development of the land in question (barring even the growth of most vegetation), while assuring the owner that the restrictions were of no consequence because the county intended to acquire the land for an airport. When, after denying the owner any use of his property for five years, the county renounced its intent to acquire the land, the Court of Appeal affirmed a trial court finding that ' " '[t]he exceptional and extraor-

bara claims that the above exception mentioned in footnote 14 has been eliminated by the recent case in *Agins v. City of Tiburon, supra.*

Therefore, we first examine the *Agins* case to determine whether or not a plaintiff may still sue for damages in inverse condemnation where there are inequitable precondemnation activities as a prelude to public acquisition in a zoning case or whether that cause of action has been superseded by the *Agins* decision. And, if a cause of action in inverse condemnation had not been eliminated by *Agins*, we will then determine whether, in the case at bench, there were such inequitable precondemnation activities, whether the motives of the ordaining body can be considered in making the determination that there were inequitable precondemnation activities, and whether plaintiff would be barred in his action for damages by the absence of a resolution of condemnation.

VI.

We do not agree that *Agins v. City of Tiburon* has eliminated the cause of action in damages for inequitable precondemnation activities, where the inequitable zoning was undertaken as a prelude to public acquisition. Although the *Agins* court held that the City of Tiburon's precondemnation

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dinary circumstances heretofore enumerated . . . constituted a take [sic] of the subject property by inverse condemnation.' " ' (271 Cal.App.2d at p. 854, 77 Cal.Rptr. [391] at 398.) Again one sees that the downzoning arises to a taking only in connection with inequitable precondemnation actions by the public agency.

"Finally, the cases hold that a public agency may not use a zoning ordinance to evade the requirement that the state acquire property which it uses for public purposes. Thus in *Sneed*, the county, rather than acquiring land for an air navigation easement, simply enacted a zoning ordinance forbidding any structure or vegetation more than three inches high and proceeded to operate flights over the area thus restricted. The Court of Appeal held that the plaintiff had stated a cause of action in inverse condemnation. Unlike the instant case, *Sneed* involved a zoning ordinance creating an actual public use of the property." (Italics in original.)

activities[7] did not amount to inequitable precondemnation activities, and therefore the plaintiffs therein were not entitled to damages in inverse condemnation, there is nothing in the *Agins* case to suggest that such a cause of action is not still legally valid. *Agins* merely held that the particular conduct of the City of Tiburon did not amount to unreasonable condemnation activities. It did not hold that, under other circumstances, a city's precondemnation activities could not be such that there would be a cause of action for damages. We therefore hold that inequitable zoning actions by a public agency undertaken as a prelude to public acquisition *may* result in an action for damages in inverse condemnation.

VII.

However, under the reasoning of *Agins* and comparing the facts of *Agins* to those in the case at bench, we find that the precondemnation activities in the case at bench also were not so unreasonable as to warrant damages in inverse condemnation. In *Agins*, as we have already noted, there was authorization of studies which recommended acquisition of plaintiff's land for open space, and there was an election in which the city passed an open space bond issue, followed by the city's sale of the bonds. In *Agins* the city also adopted an open space ordinance which downzoned the property on June 28, 1973.[8] On December 4 of that year, the city filed an eminent domain action, and on November

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[7]"[A]uthorization of studies which recommended acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding" (24 Cal.3d p. 277, 157 Cal.Rptr. p. 378, 598 P.2d p. 31) were the activities plaintiffs relied upon in *Agins* to support their claim of unreasonable precondemnation activities.

[8]The plaintiff's potential use of the five acre parcel he owned was reduced to not more than one dwelling per acre.

1, 1974, the city abandoned its eminent domain action. The Supreme Court in *Agins* rejected reliance on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345, on the grounds that *Klopping* involved unreasonable delay following an announcement to condemn and other unreasonable conduct prior to condemnation. The *Agins* court held that there was no similar unreasonable delay or other conduct, pointing out that Tiburon instituted eminent domain proceedings less than six months after the ordinance was adopted, and the land use planning and decision making procedures undertaken by elected officials did not amount to a taking. The *Agins* court held that including property for public use in a general plan and calling a bond election and urging passage to secure funds for a public purpose does not amount to a taking.

Similarly, in the case at bar, the public hearing concerning the possible acquisition of Toso's property, the placing on the ballot a proposition concerning the purchase of the property, and the failure to upzone the property also did not amount to unreasonable precondemnation activities.[9] The activities or conduct of Santa Barbara in the *Toso* case were clearly no more unreasonable than were the activities of the city in *Agins*.[10]

The City of Santa Barbara also compares the facts in the case at bar to the facts in *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 146 Cal.Rptr. 687 and in *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.2d 611, 140 Cal.Rptr. 690.

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[9]The delay herein was also not unreasonable.

[10]There are findings by the lower court herein that Santa Barbara was biased against and hostile to Toso, and there is no similar allegation of hostility in *Agins*. For reasons we shall discuss, we do not consider the allegations of hostility and bias, and therefore we do not distinguish the *Agins* case from the *Toso* case on that ground.

In *Friedman v. Fairfax* (1978) 81 Cal.App.3d 667, 146 Cal.Rptr. 687, the court found that the city's purpose in passing the downzoning ordinance was to acquire plaintiff's property, and there were public meetings and discussions in which the Planning Commission and the City Council discussed acquiring Friedman's land. The court held that mere planning, public discussion and debate do not amount to inequitable precondemnation activity. The appellate court noted there could be no inequitable precondemnation activity where there is only public discussion and debate and no official action to acquire the property. (P. 678, 146 Cal.Rptr. 687.) In the case at bench, there was merely public discussion and debate and there was also no official action to acquire the property, since the ballot proposition was advisory only. These activities would not amount to unreasonable precondemnation activities.

In *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 140 Cal.Rptr. 690, the city placed a bond issue on the ballot that specifically named a piece of property. The court therein held that the governmental body has the right to plan for acquisition of property and calling for a bond election and that urging passage to secure funds does not amount to unreasonable precondemnation activity giving rise to an action for inverse condemnation. Similarly, the advisory vote calling for the purchase of property in the case at bar would not amount to unreasonable condemnation activities.

VIII.

Toso argues that the precondemnation conduct of Santa Barbara in the instant case was exacerbated by Santa Barbara's bad faith and improper motives, that there was no similar finding of bad faith and improper motives in *Agins*, thereby distinguishing *Agins v. City of Tiburon* from the

case at bar. That brings us to the question of whether or not we may consider the improper motivation on the part of the City of Santa Barbara, and thereby distinguish the facts in the case before us from the facts in *Agins* or whether improper motivations are beyond the scope of appropriate judicial inquiry.

The lower court in the case at bar made several findings of fact related to the Santa Barbara's bad faith and improper motivations. These findings are:

"17. The vast majority of those members of the public speaking in opposition to the proposed Resort Hotel Plan were doing so for the purpose of furthering the City's acquisition of the Wilcox Property.

"21. Defendant City Council intended that denial of plaintiff's application would prevent any development of said property prior to defendant's acquisition of the property.

"22. Defendants' paramount consideration at all times was the acquisition of the Wilcox Property by a public agency as open space or as a park.

"23. Defendants had a conflict of interest in the conduct of the hearings on plaintiff's application, which conflict deprived plaintiff of a fair trial (hearing).

"24. Defendants had a personal bias and prejudice against plaintiff's interests which deprived plaintiff of a fair trial (hearing)."

The lower court also stated that defendant city had a conflict of interest in acting on plaintiff's zoning application and that the zoning denial was arbitrary, capricious, oppressive, unreasonable and in bad faith. However, although there are abundant findings that there was bad faith, there is no finding or showing of any unreasonable precondemnation ac-

tivities intended to freeze or lower the value of property and the absence of these activities may be crucial here.

In the case of *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 327, 328, 131 Cal.Rptr. 633, the appellate court said that there was a "notable exception" to the general rule that motive of city officials is irrelevant to the inquiry of the reasonableness of a zoning ordinance. The *Pinheiro* court held that motive may be inquired into where there are precondemnation activities intended to freeze or lower the value of the property so that the property can be bought at a reduced price.

While the *Friedman* case (*Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 146 Cal.Rptr. 687) also states that the purpose or motive of the ordaining body may not be inquired into, the *Friedman* case includes dicta to the effect that the evidence in that case showed an absence of improper motives and a legitimate public purpose.[11]

And in *Viso v. State of California* (1979) 92 Cal.App.3d 15, 154 Cal.Rptr. 580, plaintiff alleged that the purpose of the restrictive zoning therein was to reduce the value of property for subsequent acquisition at a reduced value. The *Viso* court cited the general rule that the purpose or motive of the agency passing an ordinance is irrelevant since the validity of the ordinance rests not on subjective motivation but on objective effect. The *Viso* court cited the *Pinheiro* case in support of the above general rule and ignored the "notable exception" of *Pinheiro* that motivation may be inquired into where the purpose of the precondemnation

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[11]The *Friedman* court stated that the evidence revealed a "legitimate public purpose, untainted by improper motives." (81 Cal.3d p. 679, 146 Cal.Rptr. p. 695.)

activities was to acquire the property at a frozen price[12] or at a reduced price.

Therefore, the cases do not clearly decide whether the "notable exception" of *Pinheiro* is still valid. Application of the rule of the *Viso* case to the facts before us would suggest that the exception is not still valid and that the correct rule is that improper motivation may not be examined. However, the "notable exception" rule of *Pinheiro* has not been overruled in a subsequent case and the *Friedman* case did point to the absence of improper motivation in making its decision, even while stating that motivations may not be inquired into.

However, we need not resolve this conflict as to the present validity of the "notable exception" mentioned in the *Pinheiro* case. In the case at bar, although the court below found that there was bad faith, capriciousness and arbitrariness on the part of the city, there is no finding that the city failed to rezone Toso's property[13] or that they engaged in other inequitable precondemnation activities to freeze or lower the value of the land in order to buy it at a cheaper price. There are findings to suggest personal bias against Toso, as well as the city's desire to acquire the property and to block its development prior to acquisition. However, there was no specific finding that there were inequitable precondemnation activities by the city that were intended to freeze or lower the value of the land in order to permit its purchase at a reduced price. Without such a showing, motivation cannot be inquired into, even if the

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[12]Since the *Viso* court did not discuss the "notable exception" it therefore did not clearly overrule the exception.

[13]We do not discuss here that it was a failure to upzone or rezone rather than downzoning. For the purpose of this issue, failure to upzone is not different from downzoning, insofar as we determine whether an action of this type is taken to reduce or lower the value of property.

"notable exception" in *Pinheiro* is valid. Since there is no showing of precondemnation activities intended to freeze or lower the value of the land, the motives of the city in passing a zoning ordinance are irrelevant whether the notable exception of *Pinheiro* is valid or not. Even if the "notable exception" of the *Pinheiro* case is still valid, all we have before us in the instant case is a situation in which the general rule (motivations may not be considered) would apply.

IX.

Furthermore, there was no resolution of condemnation. Although it has been held that a formal resolution of condemnation is not required, and certain direct and special interference giving rise to damages in inverse condemnation can occur even in the absence of a formal resolution of condemnation (*People Ex Rel. Dept. of Public Works v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 153 Cal.Rptr. 895, modified in 92 Cal.App.3d 869c) the conduct of the public agency in question must have evolved to the point where its conduct does result in special and direct interference with plaintiff's property. "The widespread impact resulting from mere general planning is noncompensable." (*People Ex Rel. Dept. Public Works v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 335, 153 Cal.Rptr. 895, 908.)

Where the city is merely engaging in long range planning, plaintiff has not stated a cause of action in inverse condemnation. (*Smith v. State of California* (1975) 50 Cal.App.3d 529, 123 Cal.Rptr. 745.) It has been held that plaintiff did not state a cause of action in inverse condemnation where a freeway project would not affect plaintiff's property for 10 or 20 years, if at all, where there had been no condemnation resolution passed, and where any incidental impair-

ment of plaintiff's property resulted only from the public knowledge of the proposed project.

And in *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d at 678, 146 Cal.Rptr. 687, the court considered that there was "no official action to acquire" the property, in determining that there was no unreasonable precondemnation activities.

In the case at bench there was no resolution of condemnation, there was no announcement of intent to condemn, nor was there any official act by the city towards acquiring the property. While an absence of a formal resolution of condemnation is not crucial, there must be some official act or official expression of intent to acquire. In the case at bench there were public meetings, negotiations, planning, debates and an advisory ballot proposition calling for acquisition but there was no official act done by the city towards acquiring the property. We have here no more than general planning that is noncompensable. Absent either a formal resolution of condemnation *or* some other official action towards the acquisition of plaintiff's property, there can be no cause of action in inverse condemnation.

X.

Plaintiff argues that the reasoning of the *Klopping* case suggests that the Legislature, in enacting Code of Civil Procedure section 1243.1 (now repealed and replaced by Code of Civil Procedure section 1245.260) has indicated a delay of more than six months after a formal resolution of intent to condemn is unreasonable delay. Plaintiff alleges that the delay following the public vote for acquisition was compensable, in that the same yardstick should apply to the period of time that elapsed after the ballot proposition. As we have said before, the ballot proposition was merely part of the general planning by the city, and the statute relied

on by plaintiff does not deal with such an election. It deals specifically with a resolution of condemnation. The election calling for the purchase of the Toso property is far short of the formal resolution of intent to condemn referred to in the above code section, and therefore that code section has no application here.

XI.

Toso argues that the city did not follow the statutory guidelines for dealing with proper methods of negotiating with a landowner (Gov.Code, §§ 7260 et seq.), the Relocation Assistance Act.

The court did find in finding No. 13 that the city did not use diligence in concluding negotiations with the landowner and therefore the conduct of the city was inconsistent with the statutory guidelines for such negotiations. However, Toso's rights are not expanded by these sections of the Government Code. Failure to comply with Government Code section 7267 would not in itself create a cause of action in inverse condemnation. Government Code section 7267 by its own language only creates a guide to be followed to the greatest extent practicable.[14]

The judgment is affirmed on the first two causes of action; it is reversed on the third, fourth and fifth causes of action. Neither party shall recover costs on appeal.

JEFFERSON, J., and ROGAN, J.,* concur.

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[14]Plaintiff's rights to damage are not expanded by section 7267. (See Gov.Code, §§ 7270, 7274.)

*Assigned by the Chief Justice of California.

APPENDIX B.

First Opinion of the California Court of Appeal.

Harold A. Toso et al., Respondents and Cross-Appellants, vs. The City of Santa Barbara et al., Appellants and Cross-Respondents. Civ. 49261, 49990.

Court of Appeal, Second District, Division 4.

Jan. 22, 1979.

As Modified on Denial of Rehearing Feb. 20, 1979.

KINGSLEY, Acting Presiding Justice.

This is an action filed by Toso individually and as agent of others against the City of Santa Barbara and all members of the city council who held office during the year 1974. The first cause of action seeks inverse condemnation damages under section 1246.3 of the Code Civil Procedure; the second cause of action seeks inverse condemnation damages for inverse condemnation; the third cause of action seeks a writ of mandate to compel the city to grant to Toso a rezoning of the property involved; the fourth claim is in mandamus (Code Civ.Proc., § 1085) and the fifth cause of action seek declaratory relief. After a trial, judgment was entered for the defendants on the first two causes of action and in favor of plaintiffs on the third, fourth, and fifth causes of action. The effect of the judgment in favor of plaintiffs was to vacate the proceedings hereinafter discussed that denied Toso a requested rezoning and to order the city to grant the rezoning requested.

The city has appealed from the judgment against it on the third, fourth, and fifth causes of action; Toso has appealed from the judgment against the plaintiffs and in favor of the city on the first and second causes of action.

While this appeal was pending, the plaintiffs other than Toso secured orders substituting themselves as parties appellant in place of Toso acting as their agent. The substituted parties then requested dismissal of the cross-appeal insofar as they were involved and we entered our order of dismissal in accordance with that request. As a result of those proceedings, we now have before us the city's appeal and a cross-appeal by Toso as an individual. We reverse the judgment adverse to the city on the third, fourth and fifth causes of action; we affirm the judgment in favor of the city on the first cause of action. We reverse the judgment in favor of the city of the second cause of action.

At the time of the events herein involved, Toso had an option to buy from his co-plaintiffs a tract of land in the City of Santa Barbara known as the Wilcox property. It was his desire and intent to develop that property as a resort hotel. The result of the events hereinafter described was that his request to rezone the property for that purpose was denied and in January of 1977, he allowed the option to expire unexercised.

In 1964, the City of Santa Barbara adopted a general plan showing the Wilcox property as a resort hotel with five dwelling units per acre. In 1965, the city zoning ordinance was amended to add a chapter providing for a resort hotel zone land zoned as RH also zoned as single and multiple family residential zone. The Santa Barbara zoning ordinance provides for zone changes by zoning amendments. The zoning ordinance provides for appeal to the city council and a public hearing following the denial of an application for a zone change.

Prior to Toso's application for rezoning, the city had permitted rezoning to RH zoning certain other property belonging to another person. This property which was granted rezoning already had a resort hotel on the premises. How-

ever, the city had also denied an RH rezoning application to W. Von Biskupsky, who wanted to build a resort hotel across the street from the Wilcox property. The city also denied the application to zone Loma Hacienda property for a resort hotel. The property surrounding the Wilcox property was zoned F-1 for single family residences at the time of plaintiff's rezoning application.

Toso knew that the city's general plan provided for a resort hotel on the Wilcox property when he secured the option to buy the property in 1973. In January of 1974, the city's environmental officer advised the City Park Director of an incipient movement to purchase the Wilcox property for a park. In February of 1974, Toso filed a rezoning application to change the zoning on the Wilcox property from E-1 and R-1 single family residences to RH resort hotel.

Citizens met with the Park and Recreation Director to discuss the purchase of the Wilcox property as a park, and sometime after that, the city had the Wilcox property appraised for value. After the City of Santa Barbara received a sum of money for settlement of an oil spill, the city placed the following proposition on the ballot: "Shall the City of Santa Barbara purchase the Wilcox property for open space use?" The planning commission had several meetings on the rezoning application, they found the resort hotel plot plan aesthetically satisfactory, but they denied Toso's application for resort hotel rezoning, finding that a commercial hotel in a single family area was an improper land use.

The voters in Santa Barbara approved the proposition favoring purchase of the Wilcox property, and the city attorney began negotiations with Toso's attorney for the purchase of the property.

Toso appealed the denial of the resort hotel rezoning application and, prior to the public hearing, the city council met in executive session with the city attorney to receive legal advice from him. A statement was prepared as a result of those sessions stating that the city council would divorce consideration of respondents' appeal on rezoning from the city's desire to purchase the Wilcox property. A public hearing was then held and respondent's rezoning application was once again denied.

The city attorney met with the city council and decided to inform Toso's attorney that the city was not interested in the property and that he was free to develop it as a residential subdivision. The city attorney advised Toso's attorney that the city did not intend to condemn the property.

Toso then filed his complaint in inverse condemnation, damages and writ of mandate. The city attorney met with the city council to prepare a draft of a resolution. Afterwards, the city council adopted Resolution 8111 stating nonintention to acquire the Wilcox property. The resolution also initiated proceedings to consider rezoning the property for a Planned Unit Development (PUD).

Trial in the action began. The planning commission approved rezoning of the Wilcox property to E-3 PUD and E-1 PUD, which allowed either single subdivision or a planned unit development residential project.

THE CITY'S APPEAL

The discussion below deals first with the city's appeal from that portion of the judgment that is not in its favor, including the order of the court to the city council to rezone the Wilcox property to permit a resort hotel.

I.

Appellant city's first argument is that the trial court erred in determining that the city council's denial of respondent's rezoning application was a quasi-judicial act reviewable under Code of Civil Procedure section 1094.5 rather than an act reviewable under Code of Civil Procedure section 1085. We agree. Toso, by his own language, sought to have the Wilcox property "rezoned" and he submitted a "rezoning" application for that purpose. Although granting a variance, a conditional use permit, or an exception to use is an administrative act, where rezoning is requested it is a legislative act. (*Tandy v. City of Oakland* (1962) 208 Cal.App.2d 609, 611, 25 Cal.Rptr. 429; *Topanga Assn. for A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 513, 113 Cal.Rptr. 836, 522 P.2d 12; *Banville v. County of Los Angeles* (1960) 180 Cal.App.2d 563, 570, 4 Cal.Rptr. 458.) Rezoning is accomplished by amendment of a zoning ordinance and by the same procedure as the original enactment, and therefore the city council's act in amending a zoning ordinance to exclude previously included property is a legislative and not administrative act. (*Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 834, 323 P.2d 71.) Therefore, the court below erred in its conclusion that the denial of Toso's rezoning application was a quasi-judicial act rather than a legislative act.

The trial court below then exacerbated this error by applying Code of Civil Procedure section 1094.5 rather than Code of Civil Procedure section 1085 as a method of review. Review under Code of Civil Procedure section 1094.5 is not available where an agency is acting in a legislative capacity. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35, 112 Cal.Rptr. 805, 520 P.2d 29.) Zoning is a legislative act reviewable under ordinary mandamus under Code of Civil Procedure section

1085.[1] (*Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 137 Cal.Rptr. 304.)

II.

Appellant city's second contention is that the trial court erred when it substituted its judgment for that of the city council by ordering the city council to apply resort hotel zoning to the Wilcox property, and by finding that the Planned Unit Development zoning for the Wilcox property was null and void. Again, we agree with appellant city. In this state courts generally refuse to overturn the legislative bodies' refusal to rezone. (*Tandy v. City of Oakland, supra,* 208 Cal.App.2d 609, 25 Cal.Rptr. 429; *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461, 202 P.2d 38; *Sladovich v. Fresno* (1958) 158 Cal.App.2d 230, 322 P.2d 565.) Denial of rezoning will be held valid unless there is no reasonable relation to the public welfare; and before the courts will interfere with a zoning ordinance, the plan must be arbitrary.[2] (*Lockard v. City of Los Angeles, supra,* 33 Cal.2d 453, 461, 202 P.2d 38.) The sole issue on review of a zoning ordinance is whether or not there is any reasonable basis to support the legislative determination of the governing body, and the appellate court is not bound by the findings of the trial court if the record shows the question is debatable. (*Ensign Bickford Realty Corp. v. City Council, supra,* 68 Cal.App.3d 467, 137 Cal.Rptr. 304.) In zoning cases, findings of the trial court that property is suitable only for certain purposes is not controlling and the appellate

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[1]*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 5, 125 Cal.Rptr. 365, 542 P.2d 237 states that the remedy for discriminatory zoning is also under Code of Civil Procedure section 1085. But see *Sladovich v. County of Fresno* (1958) 158 Cal.App.2d 230, 322 P.2d 565.

[2]The suggestion that zoning decisions by local zoning bodies are presumptively valid under all circumstances has been criticized in *Fasano v. Bd. of Co. Commissioners* (1973) 264 Or. 574, 507 P.2d 23.

court will reverse where the lower court substitutes its judgment for that of the local legislative body. (*Lockard v. City of Los Angeles, supra,* 33 Cal.2d 453, 462, 202 P.2d 38.)

In the case at bar, the lower court improperly substituted its judgment for that of the local legislative body on the issue of the propriety of resort hotel zoning for the Wilcox property. Since it appears that the reasonableness of the Santa Barbara City Council's zoning ordinance prohibiting a resort hotel was at the very least debatable and since a zoning ordinance is presumptively valid (see *Ensign Bickford Realty Corp. v. City Council, supra,* 68 Cal.App.3d 467, 137 Cal.Rptr. 304), the trial court below erred in ordering the city council to rezone the Wilcox property to permit a resort hotel. Since the Wilcox property is surrounded by other property zoned for single family residences, and since another property owner who had property across the street from the Wilcox property also had his application to rezone for a resort hotel turned down, we can not say that the zoning bodies' conduct herein was unreasonable. The PUD zoning authorized by the city council was at the least debatable, and therefore the lower court should not have substituted its judgment for that of the zoning body.

III.

Appellant argues that, even if administrative mandamus under Code of Civil Procedure section 1094.5 was the proper remedy, the court improperly applied its independent judgment in reviewing the matter before it. As we have said before, it is our opinion that Code of Civil Procedure section 1085 was the proper remedy and not Code of Civil Procedure section 1094.5. Nevertheless we have answered the city's contentions in this matter.

A property owner acquires no vested right as against future zoning merely by purchasing real property (*Anderson v. City Council* (1964) 229 Cal.App.2d 79, 40 Cal.Rptr. 41), and by zoning the property the government makes no representation to the landowner that he will be exempt from the zoning laws in effect at the time he applies for his permit. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546.) Since the landowner had no vested right in the continuance of the zoning ordinance, even in a review under Code of Civil Procedure section 1094.5, the trial court is confined to evidence received by the administrative body, and the court may not reweigh the evidence. The court may only consider whether there is substantial evidence to sustain the finding. (See *Rapp v. Napa County Planning Com.* (1962) 204 Cal.App.2d 695, 697, 22 Cal.Rptr. 643.) Therefore, even if Code of Civil Procedure section 1094.5 had been the proper remedy, the trial court would not have been free to substitute its judgment.

IV.

Appellant argues that, even assuming administrative mandamus was the proper remedy, the trial court erred in concluding that the city council abused its discretion. Appellant first asserts that the trial court erred in concluding that the city council did not proceed procedurally in the manner prescribed by law. The findings do not show procedural violations, and there is no showing of abuse of a discretion.

V.

Appellants argue that the court erred in concluding that the city council's decision is not supported by the findings. The planning commission had several reasons to support its decision that the Wilcox property should not be rezoned to be a resort hotel. They believed a resort hotel would be an

objectionable intrusion into a residential area and would cause an unwarranted decentralization of the motel-tourist industry. There is substantial evidence to support the decision of the city council to deny respondent rezoning application. Therefore the court erred in this finding.

VI.

Appellant argues that the court erred in concluding there was no substantial evidence to support the city council's decision to deny the rezoning application. There was testimony in the record that use as a resort hotel was inconsistent with family residential purposes and this was in itself substantial evidence to support the city council's decision to deny rezoning.

VII.

Appellant argues that, assuming that administrative mandamus was the proper remedy, the trial court erred in concluding that the city council did not grant respondent a fair trial. Respondent stipulated to no procedural due process violations, and there is no showing that the procedure itself was improper or unfair.

VIII.

Appellant argues that the trial court erred in considering the motives or intentions of the city council in denying respondent's rezoning application.[3] Again we agree with the city. The purposes or motives of the city officials in passing a zoning ordinance have long been held irrelevant to any

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[3]Finding 21 and Finding 22 read:

"21, Defendant City Council intended that denial of plaintiff's application would prevent any development of said property prior to defendant's acquisition of the property.

"22. Defendants' paramount consideration at all times was the acquisition of the Wilcox Property by a public agency as open space or as a park."

inquiry concerning the reasonableness of that ordinance. *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, 264 P.2d 932 and *Ensign Bickford Realty Corp. v. City Council, supra,* 68 Cal.App.3d at page 478, 137 Cal.Rptr. 304, held that the motive of the city council in declining to amend its zoning ordinances is irrelevant.[4] Although motives were inquired into in *Kissinger v. City of Los Angeles* (1958) 161 Cal.App.2d 454, 327 P.2d 10, in *Kissinger* the ordinance was not passed in a lawful manner, and in *Smith v. County of Santa Barbara* (1966) 243 Cal.App.2d 126, 130, 52 Cal.Rptr. 292 there was a claim of spot zoning. There are no similar claims in the case at bench and therefore the general rule that motives are not properly inquired into should apply.

IX.

Appellant argues that the trial court erred in concluding that the planning commission's approval of respondent resort hotel plot plan required the city to rezone the property for a resort hotel.

The approval of a plot plan did not require rezoning. (See *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546.)

X.

In light of our conclusion that the trial court erred in directing a rezoning, we need not, and do not, consider the city's further contentions that the trial court erred in re-

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[4]Under certain circumstances, motives of the city council may be relevant in determining whether a landowner is entitled to damages in inverse condemnation. That matter will be discussed in the second of the two appeals.

quiring testimony concerning the discussions between the council and the city attorney. We also need not, and do not, discuss the city's attack on certain findings by the trial court.

THE APPEAL OF TOSO

Toso has appealed from the denial of his claim for money damages. The facts relevant to that appeal are as follows:

Although in 1974 the Wilcox property was zoned for single family residences, the general plan showed a resort hotel symbol, and at that time the property was worth $4,700,000. Toso entered into an agreement to purchase the Wilcox property, and submitted to the city an application for RH overlay zoning. After that, city officials and various citizens groups began looking into purchase of the Wilcox property for a park. The Environmental Impact Report had the following statement: "If the approval is not obtained for that development, it may be expected that land costs will drop considerably, one estimate of cost if development is denied, at from $500,000 to $750,000, or from $7,692 to $15,538 per acre." Environmental groups continued to urge the city to purchase the Wilcox property for a park, appraisals on the property were arranged, and the Director of Recreation and Parks said funds would be available for its purchase in 1975-1976. The rezoning application came up for a hearing, and the council voted to place the proposition calling for the purchase of the Wilcox property on the ballot in the next election. One of the councilmen urged immediate acquisition of the property on the grounds that waiting may increase the price. The city attorney asked Toso's attorney for the price of the property. A hearing was held on the denial of Toso's application for RH overlay zoning. The council in executive session decided Toso's asking price was too high. In a meeting, the city attorney said the vote of the people on the decision to purchase the

Wilcox property was advisory only and not binding on the city. The city attorney said that the council could divorce itself from any desire to purchase property for a park and, could consider the matter of the zoning application on its merits. The city then told Toso they were no longer interested in buying the Wilcox property and that he was free to develop it as a residential subdivision. The city attorney dictated Resolution #1811 which rezones the Wilcox property to a Planned Unit Development. Toso alleges that the zoning change to PUD caused the property's value to diminish to $600,000.

I.

Since the judgment in this case the Regional Coastal Commission refused to accept Toso's application to proceed with the inn, and Toso's option to purchase the property has expired. Therefore, the lower court judgment ordering the city to rezone the Wilcox property was of no value to Toso, since he does not own the property. The mandamus portion of the judgment is therefore of no interest to Toso.

II.

Cross-respondent city argues that the appropriate remedy for arbitrary and discriminatory zoning is mandamus, not inverse condemnation. Although that statement is a correct statement of the law (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 514, 125 Cal.Rptr. 365, 542 P.2d 237; *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 253, 146 Cal.Rptr. 428) under certain circumstances zoning regulations may be treated as a taking and the landowner may sue for damages in inverse condemnation. (*Sneed v. County of Riverside* (1963) 218 Cal.App.2d 205, 32 Cal.Rptr. 318; *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, 77 Cal.Rptr. 391.)

Whether a zoning ordinance is so arbitrary or burdensome so as to constitute a taking is a question of fact to be determined by the trier of that issue.

III.

The city argues that the fact that Toso failed to execute his option to purchase the Wilcox property does not affect the issue of whether the city's actions constitute a compensable damaging or taking. We agree. However, this proposition does not necessarily affect the city's position one way or other. Although it is true that Toso argued that mandamus is of no use to Toso since he no longer had any interest in the property, and although the city is also correct that whether or not Mr. Toso had an existing interest in the property is irrelevant in determining whether the city's acts constituted a taking, it does not follow from these two propositions that Toso's only remedy is mandamus. The city's reasoning that this conclusion follows from the above propositions is sophistry. As we have said above, under certain circumscribed circumstances, zoning actions may constitute a taking compensable in damages for inverse condemnation.

We distinguish this reasoning from that in *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 140 Cal.Rptr. 690, which held that relief is properly denied where plaintiff's option expired prior to the filing of the condemnation action. That case had no zoning action that was excessively harsh while plaintiff held the option. In the case at bar, if there was an improper zoning that was excessively arbitrary and burdensome while Toso held his option, Toso would not be denied damages simply because his option had expired.

IV.

Toso argues that the court improperly applied a standard of "physical taking" or total uselessness of the zoned property as those standards necessary for finding a taking for

damages for inverse condemnation. The court drew the following conclusion of law:

"3. The actions, activities and decisions of the defendants, involving the Wilcox Property since February 6, 1974, did not result in a physical damaging of said property (as distinguished from market value depletion and marketability) as contemplated by the California Constitution, Article One, Section Nineteen (then Section Fourteen)."

A physical taking is unnecessary to a finding of damages in inverse condemnation, and a valid zoning ordinance may operate so oppressively as to amount to a taking giving rise to damages in inverse condemnation. (*Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, 129 Cal.Rptr. 575.) Although a mere diminution in the value of real property resulting from a proper exercise of the police power does not invalidate the action or require payment of damages (*Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 127 Cal.Rptr. 520; *Sierra Terreno v. Tahoe Regional Planning Agency* (1978) 79 Cal.App.3d 439, 144 Cal.Rptr. 776; *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 146 Cal.Rptr. 687; *Orsetti v. City of Fremont* (1978) 80 Cal.App.3d 961, 146 Cal.Rptr. 75), inequitable zoning action undertaken by a public agency as a prelude to public acquisition may result in damages. (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516-17, fn. 14[5], 125 Cal.Rptr.

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[5]Footnote 14 from *HFH, Ltd.* reads as follows:

"Neither *Selby* [*Realty Co. v. City of Buenaventura*, 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111] nor this case presents the distinct problems arising from inequitable zoning actions undertaken by a public agency as a prelude to public *acquisition* (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345; *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, 77 Cal.Rptr. 391); or from zoning classifications invoked in order to evade the requirement that land *used* by the public must be acquired in eminent domain proceedings (*Sneed v. County of Riverside* (1963) 218 Cal.App.2d 205, 32 Cal.Rptr. 318). Thus in *Klopping* the city in question made public announcements

365, 371, 542 P.2d 237, 243. (See also *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 676, 146 Cal.Rptr. 687; *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 131 Cal.Rptr. 633.)

V.

In the light of the above cases, two questions arise. The first question is whether the zoning is so arbitrary or burdensome as to constitute a compensable taking (*Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, 129 Cal.Rptr. 575; *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 146 Cal.Rptr. 687), or whether there was merely a diminution in market value as a result of down

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that it intended to acquire the plaintiff's land, then unreasonably delayed commencement of eminent domain proceedings, with the predictable result that the property became commercially useless and suffered a decline in market value. We held only that the plaintiff should be able to include in his eminent domain damages the decline in value attributable to this unreasonable precondemnation action by the city. The case thus in no way resembles the instant one, in which plaintiffs made no allegations that the city intends to condemn the tract in question.

"Similarly in *Peacock* the county had refused to permit any development of the land in question (barring even the growth of most vegetation), while assuring the owner that the restrictions were of no consequence because the county intended to acquire the land for an airport. When, after denying the owner any use of his property for five years, the county renounced its intent to acquire the land, the Court of Appeal affirmed a trial court finding that " '[t]he exceptional and extraordinary circumstances heretofore enumerated constituted a take [*sic*] of the subject property by inverse condemnation.' " (271 Cal.App.2d at p. 854, 77 Cal.Rptr. 391.) Again one sees that the downzoning rises to a taking only in connection with inequitable precondemnation actions by the public agency.

"Finally, the cases hold that a public agency may not use a zoning ordinance to evade the requirement that the state acquire property which it uses for public purposes. Thus in *Sneed*, the county, rather than acquiring land for an air navigation easement, simply enacted a zoning ordinance forbidding any structure or vegetation more than three inches high and proceeded to operate flights over the area thus restricted. The Court of Appeal held that the plaintiff had stated a cause of action in inverse condemnation. Unlike the instant case, *Sneed* involved a zoning ordinance creating an actual public use of the property." (Italics in original.)

zoning, such that no cause of action arises. (*Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 131 Cal.Rptr. 633; *Brown v. City of Fremont* (1977) 75 Cal.App.3d 141, 142 Cal.Rptr. 46; *Sierra Terreno v. Tahoe Regional Planning Agency* (1978) 79 Cal.App.3d 439, 144 Cal.Rptr. 776.)

The second question is whether there are inequitable precondemnation activities on the part of the public agency.

VI.

We turn first to the question of whether the city used its zoning power to in effect take the land without paying for it. Public entities may not use their zoning power as a subterfuge to take land for public purposes without paying just compensation. (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 146 Cal.Rptr. 428; see *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, 129 Cal. Rptr. 575.) In the case at bar, the city did not zone the land for open space use, or require that the land be developed with residences separated by large areas of open space. On the contrary, the city zoned the land for planned unit development. The plaintiff can not successfully claim that the city used the zoning power to in effect take the land for public purposes, without paying for it, since the owner of the land was free to develop it in accord with PUD zoning.

VII.

Next we examine the question of whether the zoning was so arbitrary or burdensome as to be a "taking" by the public entity. One method by which zoning has been held so arbitrary or burdensome as to constitute a taking is to deprive the owner of all beneficial use of the land. It has been held that, where the zoning deprives the owner of all beneficial use of the land, damages are proper. (*Pinheiro v. County*

of Marin 60 Cal.App.3d 323, 131 Cal.Rptr. 633; *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, 77 Cal. Rptr. 391.) However, the question of whether the zoning ordinance is so arbitrary or burdensome as to constitute a taking is a question of fact to be determined by the trier of that issue (*Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, 618, 129 Cal.Rptr. 575) and on appeal we look for substantial evidence to support the court's finding.

The case before us is clearly distinguishable from those cases where the government attempted to take plaintiff's space for public use without paying for the space. Plaintiff herein was free to purchase the land and develop it with units or residences. Plaintiff may not successfully claim either that he was deprived of all beneficial use or that the government effectively or pragmatically took the land for public purposes.

Although the case at bench is not a case where the zoning ordinance so completely and unreasonably prevents any beneficial use that the zoning amounts to a compensable taking.[6] (*Peacock v. County of Sacramento, supra,* (1969) 271 Cal.App.3d 845, 77 Cal.Rptr. 391), nor is this a case where a zoning regulation amounts to a taking because the government used the zoning power to take the land for public purposes without paying for it,[7] the question remains in the case before us as to whether there was compensable inequitable zoning actions undertaken by a public agency as a prelude to acquisition. (*HFH, Ltd. v. Superior Court, supra,* (1975) 15 Cal.3d 508, 516, 517, fn. 14, 125

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[6]The property is zoned for PUD and can be developed for that purpose.

[7]The city is not in effect using the property for open space or for a park, so there is not taking of the land for a public purpose.

Cal.Rptr. 365, 542 P.2d 237; see also *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 131 Cal.Rptr. 633.)

VIII.

We now examine the remaining question: whether there were inequitable precondemnation activities (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345) and, if so, whether the absence of a formal resolution of intent to condemn would act as a bar to the plaintiff's recovery. In the case at bench, the lower court's findings Nos. 17, 21, 22, 23 and 24 lead inexorably to the conclusion that such inequitable conduct as a prelude to public acquisition existed. These findings are:

"17. The vast majority of those members of the public speaking in opposition to the proposed Resort Hotel Plan were doing so for the purpose of furthering the City's acquisition of the Wilcox Property.

"21. Defendant City Council intended that denial of plaintiff's application would prevent any development of said property prior to defendant's acquisition of the property.

"22. Defendants' paramount consideration at all times was the acquisition of the Wilcox Property by a public agency as open space or as a park.

"23. Defendants had a conflict of interest in the conduct of the hearings on plaintiff's application, which conflict deprived plaintiff of a fair trial (hearing).

"24. Defendants had a personal bias and prejudice against plaintiff's interests which deprived plaintiff of a fair trial (hearing)."

Thus, the court below found that denial of plaintiff's application would prevent development of the property prior to defendant's acquisition of the property and that defend-

ant's paramount concern was to acquire the property as open space. The court also found that defendant city had a conflict of interest in acting on plaintiff's zoning application and the court stated that the zoning denial was arbitrary, capricious, oppressive, unreasonable, and in bad faith. Therefore, it follows that the bad faith denial of Toso's rezoning application, when considered with the simultaneous efforts of the city to purchase the Wilcox property, amounted in its totality to the type of inequitable precondemnation activity contemplated by footnote 14 in the *HFH, Ltd.* case.

IX.

However, the record shows no resolution of intent to condemn. Although the Supreme Court in *Jones v. People ex rel. Dept. of Transportation* (1978) 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165, declined to decide whether such a resolution was necessary, in that case the court found that there was no remaining beneficial use of the land, due to denial of access to the land. In the case at bar there was a beneficial use of the land, and therefore the case at bar is not strictly analogous to the ruling of the *Jones* case.

However, we do not think the absence of a resolution to condemn is necessarily crucial here.

In order to state a cause of action in inverse condemnation, the governmental activities must have gone beyond mere general planning or preliminary activities (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111), and this would be true where the plaintiff is trying to show either "unreasonable delay" or to show "other unreasonable conduct." But in the case at bar there is governmental activity beyond mere general planning and preliminary activities. We have the ballot proposition, which although not equivalent to a resolution to condemn, went far beyond the mere "general planning"

or mere "preliminary activities" that are not compensable. Although the ballot proposition did not require that the city council purchase the Wilcox property (because the city council had the last word on the decision to purchase), it was a governmental activity that went further than mere plot planning or designation of land for future acquisition or planning a route (see *Jones v. People ex rel. Dept. of Transportation* (1978) 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165).

Also, the *Pinheiro* court (*Pinheiro v. County of Marin*) said, with the notable exception of precondemnation activities intended to freeze or lower the value of land, the motives of the city in passing a zoning ordinance are irrelevant. But we do have before us a case where the city was found to have acted in bad faith and where the city attempted to purchase property, so we have before us a case that involves a "notable exception".[8] The ballot proposition, the news release, the public meetings, the television interviews concerning the city's intent to purchase the property, the conversations by the city council to the effect that the price would go up if there was development of the properties, all show precondemnation conduct and activity intended to freeze or lower the value of the property. These activities, directed towards the acquisition of plaintiff's property, are not mere plot planning for future use. The activities of the government were direct, specific, active attempts to acquire the property, and it was reasonable for Toso and others to believe the purchase was imminent.

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[8]We distinguish this case from *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690 which held that calling a bond election and urging passage to secure funds for a public purpose does not constitute a taking. We do not rely on the "ballot proposition" as a "taking." The taking here was the "inequitable activities."

Our conclusion that there may be a taking even without an ordinance actually condemning the property may be aided by certain language and reasoning in *Concrete Service Co. v. State of California ex rel. Dept. Pub. Wks.* (1969) 274 Cal.App.2d 142, 146, 78 Cal.Rptr. 923.[9] That case reasoned that, although plotting or planning alone does not constitute a taking as damaging, when the plotting or planning is accompanied by other acts of the municipal authority that creates a situation so unusual and extraordinary as to create a taking, the owner may be entitled to damages although no ordinance was actually passed. In the case at bar the ballot proposition with its language calling for the purchase of the Wilcox property considered *in combination* with the city's failure to rezone in accordance with the plot plan for RH overlay,[10] and considered with other conduct arranging for the purchase of the property, when viewed in its totality, provide such unusual or extraordinary activities, on the part of the municipality.

There is nothing improper in the city's desire to preserve for the public an open space park by buying or condemning the Wilcox property, nor is there anything improper in zoning the Wilcox property to preserve the existing character of the area. These activities are clearly proper exercises of police power. However, the city may not use its zoning police power to lower or freeze the value of the property prior to condemning it. (See *Peacock v. County of Sacramento, supra,* (1969) 271 Cal.App.2d 845, 77 Cal.Rptr. 391 and discussion in *City of Walnut Creek v. Leadership*

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[9]But in that case there was an unequivocal expression of intent to condemn. In our case there is an expression of intent to purchase, but we can not say it is unequivocal.

[10]There is no vesting of rights where tentative maps and plot plan have been approved. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 115 Cal.Rptr. 67.)

Housing Systems, Inc. (1977) 73 Cal.App.3d 611 at 619, 620, 140 Cal.Rptr. 690.) The city should not be able to engage in unfair precondemnation activities that lower the value of such property, and then later abandon any plans to condemn or buy the property. And whether or not the ballot proposition amounts to a resolution to purchase or condemn[11] would not affect our holding that the totality of the activity of the city amounted to the type of conduct that was compensable.

As in *Jones v. People ex rel. Dept. of Transportation, supra,* (1978) 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165, we decline to decide whether a resolution to condemn was actually necessary. The activity here went way beyond mere general planning, and the city's conduct was found to be "oppressive," "biased" and "arbitrary and in bad faith." Under such circumstances, Mr. Toso should not be without a remedy. The ballot proposition, though advisory only and not a resolution to purchase, was sufficient, when considered with other governmental activities, to make Mr. Toso's embryonic rights viable, whether or not there was a resolution to condemn property. Plaintiff can show invasion of a property right directly affecting him to his injury; this is not a case where there is mere general planning and preliminary activities that do not give rise to liability for damages for inverse condemnation. (*Selby Realty Co. v. City of Buenaventura* (1973) 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111; *Smith v. State of California* (1975) 50 Cal.App.3d 529, 123 Cal.Rptr. 745.)

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[11]Calling a bond election and urging its passage to secure public funds for public purpose does not constitute a taking. (*City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690.)

X.

Toso contends that he is entitled to recover damages in inverse condemnation under the provisions of section 1245.260 of the Code of Civil Procedure (formerly section 1243.1) which now reads as follows:

"(a) If a public entity has adopted a resolution of necessity but has not commenced an eminent domain proceeding to acquire the property within six months after the date of adoption of the resolution, the property owner may, by an action in inverse condemnation, do either or both of the following:

"(1) Require the public entity to take the property and pay compensation therefor.

"(2) Recover damages from the public entity for any interference with the possession and use of the property resulting from adoption of the resolution.

"(b) No claim need be presented against a public entity under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code as a prerequisite to commencement or maintenance of an action under subdivision (a), but any such action shall be commenced within one year and six months after the date the public entity adopted the resolution of necessity.

"(c) A public entity may commence an eminent domain proceeding or rescind a resolution of necessity as a matter of right at any time before the property owner commences an action under this section. If the public entity commences an eminent domain proceeding or rescinds the resolution of necessity before the property owner commences an action under this section, the property owner may not thereafter bring an action under this section.

"(d) After a property owner has commenced an action under this section, the public entity may rescind the reso-

lution of necessity and abandon the taking of the property only under the same circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding.

"(e) Commencement of an action under this section does not affect any authority a public entity may have to commence an eminent domain proceeding, take possession of the property pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6, or abandon the eminent domain proceeding.

"(f) In lieu of bringing an action under subdivision (a) or if the limitations period provided in subdivision (b) has run, the property owner may obtain a writ of mandate to compel the public entity, within such time as the court deems appropriate, to rescind the resolution of necessity or to commence an eminent domain proceeding to acquire the property."

Section 1243.1, now repealed, reads as follows:

"In any case in which a public entity, as defined in Section 811.2 of the Government Code, which possesses the power of eminent domain establishes by resolution or ordinance the necessity to acquire a particular parcel or parcels of real property by eminent domain, and such public entity does not thereafter initiate, within six months, an action in eminent domain to take such parcel, the owner of the parcel may bring an action in inverse condemnation requiring the taking of such parcel and a determination of the fair market value payable as just compensation for such taking. In such inverse condemnation action, the court may, in addition, or in the alternative, if it finds that the rights of the owner have been interfered with, award damages for any such interference by the public entity. This section shall

not affect a public entity's authority to do any of the following:

"(1) Institute a condemnation action.

"(2) Take immediate possession of the particular parcel of property sought to be condemned.

"(3) Rescind a resolution or ordinance which established the necessity to acquire a particular parcel of real property and abandon the condemnation action."

His theory is that the approval by the voters of the ballot proposition above referred to amounted to the adoption of a resolution of necessity within the meaning of that section. If an actual resolution specifically authorizes condemnation of plaintiff's property Code of Civil Procedure section 1243.1 would have been dispositive of the case. (*Smith v. State of California* (1975) 50 Cal.App.3d 529, 123 Cal.Rptr. 745.) However, here there was merely a ballot proposition passed by the electorate and no actual resolution of condemnation.

The ballot before the People was not a resolution of necessity. It is clear that the city council desired, before proceedings to expend a large sum of money for a park or open space on the Wilcox property, to ascertain whether the voters at large would approve such an acquisition. To that end, they placed the issue on the ballot. When the votes were recorded, it appeared that only a small majority were in favor of that use of public funds.[12] In light of that equivocal approval and the large sum involved, the council, acting on its own, decided to reject the park idea. We can see in the

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[12]It was agreed at oral argument that the ballot proposition passed by only a small percentage of the total vote thereon.

ballot proposition no more than advice by the voters,[13] to be acted on or rejected by the council. Although the ballot proposition was not labeled "advisory" only, the ballot proposition was not the legal equivalent of a resolution of necessity and section 1245.260 does not aid Toso.[14]

Also, not only was the ballot proposition intended to be only advisory, two technical considerations make any conclusion that the voter action was the equivalent of the statutory required resolution legally impossible. (1) Prior to condemnation there must be two decisions—one a decision that acquisition is desirable and second an express finding by the condemning authority that the taking of the particular property is "necessary" to accomplish a desired result. The ballot proposition, at best, went to the first of those steps; it in no way directed itself to the matter of "necessity" and it is only a formal finding of necessity that brings the statute into play.

The voter approval of the ballot proposition did not constitute a resolution or ordinance to acquire the Wilcox property by eminent domain within the meaning of Code of Civil Procedure section 1243.1 (now Code Civ.Proc., § 1245.260).

XI.

Toso argues that the city did not follow the statutory guidelines for dealing with proper methods of negotiating with a landowner (Gov.Code, §§ 7260 et seq.), the Relocation Assistance Act.

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[13]Calling a bond election and urging passage to secure funds for public purpose does not constitute a taking. See *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690.

[14]The language of the statute requires a "resolution of necessity." This question is to be distinguished from the question of whether or not a resolution of intent to condemn is necessary where plaintiff does not rely on the statute, but relies on rights developed under the case law.

The court did find in finding No. 13 that the city did not use diligence in concluding negotiations with the landowner and therefore the conduct of the city was inconsistent with the statutory guidelines for such negotiations. However, Toso's rights are not expanded by these sections of the Government Code. Failure to comply with Government Code section 7267 would not in itself create a cause of action in inverse condemnation. Government Code section 7267 by its own language only creates a guide to be followed to the greatest extent practicable.[15]

XII.

Toso argues that the fact that Toso's right to purchase the property expired should not preclude him from recovering for his loss. Where it was the precondemnation activities that ultimately caused the loss, the fact that the plaintiff no longer has the property does not necessarily bar him from recovery. (See *Klopping v. City of Whittier, supra*, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345; *Eldridge v. City of Palo Alto, supra*, 57 Cal.App.3d 613, 129 Cal.Rptr. 575.) We distinguish this case from *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611, 140 Cal.Rptr. 690, which held that where a developer's option expires prior to the condemnation award, the developer was not entitled to a share of the award. In the *City of Walnut Creek* case, there were many distinguishing factors, including the fact that there was no invasion of property prior to the time the developer surrendered the option. The *City of Walnut Creek* court distinguished the case before it, from those cases where there was a change in zoning that was particularly harsh and possibly calculated to decrease

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[15]Plaintiff's rights to damage are not expanded by section 7267. (See Gov. Code, §§ 7270, 7274.)

any future condemnation award. (See pp. 619, 620, 140 Cal.Rptr. 690.) In the case at bar the oppressive, harsh and bad faith conduct occurred prior to the expiration of Toso's option and was very likely designed to decrease any possible future condemnation award.

The judgment on the first cause of action is affirmed; the judgment on the second, third, fourth and fifth causes of action is reversed. Cross-appellant Toso shall recover his costs on appeal.

JEFFERSON and ALARCON, *JJ*., concur.

APPENDIX C.

Comparison of Treatment of Facts in First and Second Court of Appeal Opinions.

Facts as Viewed by Court of Appeal in First Opinion.	Facts as Viewed by Court of Appeal in Second Opinion.
"Therefore, it follows that the bad faith denial of Toso's rezoning application, when considered with the simultaneous efforts of the City to purchase the Wilcox property, amounted in its totality to the type of inequitable precondemnation activity contemplated by Fn. 14 in the *HFH, Ltd.* case." (151 Cal.Rptr. 922.)	"However, although there are abundant findings that there was bad faith, there is *no finding or showing of any unreasonable precondemnation activities intended to freeze or lower the value of the property* and the absence of these activities may be crucial here." 162 Cal.Rptr. 221, emphasis added.
"But in the case at bar there is governmental activity beyond mere general planning and preliminary activities. We have the ballot proposition, which although not equivalent to a resolution to condemn, *went far beyond the mere 'general planning' or mere 'preliminary activities' that are not compensable.*" (151 Cal.Rptr. 922, emphasis added.)	"In the case at bar, although the Court below found that there was bad faith, capriciousness and arbitrariness on the part of the City, there is *no finding that the City failed to rezone Toso's property or that they engaged in other inequitable precondemnation activities to freeze or lower the value of the land in order to buy it at a cheaper price*. There are findings to suggest personal bias against Toso, as well as the City's desire to acquire the property and to block its development prior to acquisition. However, there was no specific finding that there were inequitable precondemnation activities by the City that were intended to freeze or lower the value of the land in order to permit its purchase at a reduced price." 162 Cal.Rptr. 222, emphasis added.
"The ballot proposition, the news release, the public meetings, the television interviews, concerning the City's intent to purchase the property, the conversations by the City Council to the effect that the price would go up if there was development of the properties, *all show precondemnation conduct and activity intended to freeze or lower the value of the property.*" (151 Cal.Rptr. 922-923, emphasis added.)	
"*The activities of the government were direct, specific, active attempts to acquire the property* and it was reasonable for Toso and others to believe the purchase was imminent." (151 Cal.Rptr. 923, emphasis added.)	"In the case at bench there was no . . . official act [done] by the city towards acquiring the property." 162 Cal.Rptr. 223.

"In the case at bar the ballot proposition with its language calling for the purchase of the Wilcox property considered *in combination* with the City's failure to rezone in accordance with the plat plan for RH overlay, and considered with other conduct arranging for the purchase of the property, when viewed in its totality, provides such unusual or extraordinary activities, on the part of the municipality." (As to create a taking entitling the owner to damages even though no condemnation ordinance was actually passed.) (151 Cal.Rptr. 923.)

"However, the City may not use its zoning police power to lower or freeze the value of the property prior to condemning it. (Citations omitted.) The City should not be able to engage in unfair precondemnation activities that lower the value of such property, and then later abandon any plans to condemn or buy the property. And whether or not the ballot proposition amounts to a resolution to purchase or condemn would not affect our holding that the totality of the activity of the City amounted to the type of conduct that was compensable." (151 Cal.Rptr. 923.)

"The activity here went way beyond mere general planning, ... Plaintiff can show invasion of a property right directly affecting him to his injury; this is not a case where there is mere general planning and preliminary activities that do not give rise to liability for damages for inverse condemnation. (151 Cal.Rptr. 923, emphasis added, citations omitted.)

"In the case at bar the oppressive, harsh and bad faith conduct occurred prior to the expiration of Toso's option and *was very likely designed to decrease any possible future condemnation award.*" (151 Cal.Rptr. 926, emphasis added.)

"We have here no more than general planning that is noncompensable." (162 Cal.Rptr. 223.)

APPENDIX D.

Order of California Supreme Court Granting Hearing and Remanding to Court of Appeal

2d Civil No. 49261. In the Supreme Court of the State of California. In Bank.

Toso et al., v. City of Santa Barbara, et al.

Filed: May 17, 1979.

Petition for hearing granted. Cause transferred to this court and retransferred to the Court of Appeal, Second District, Division Four, for reconsideration in light of Agins et al vs. City of Tiburon et al. (1979).

BIRD, *Chief Justice*
TOBRINER, *Justice*
MOSK, *Justice*
RICHARDSON, *Justice*
MANUEL, *Justice*
NEWMAN, *Justice*

APPENDIX E.

Trial Court Findings of Fact. and Conclusions of Law.

Superior Court of the State of California, for the County of Santa Barbara.

Harold A. Toso, Individually and as Agent for and on behalf of Whitney A. Collins, Trustee, Crocker National Bank, Successor Trustee under the Will of Margaret Whitney Wilcox and Successor Trustee under the Will of Roy F. Wilcox, Dede Wilcox Eddy, Denis H. Wilcox, Richard K. Wilcox, Julia Collins Haselton, Plaintiffs, vs. The City of Santa Barbara, A Municipal Corporation, the Santa Barbara City Council, Mayor David T. Shiffman, Franklin E. Lowance, Leo Martinez, Alice B. Rypins, Nyle G. Utterback, Lawrence D. Schatz, and Gus Chavalas, each a member of the City Council for the City of Santa Barbara, and Doe I through Doe XX, inclusive, Defendants. No. 106854.

Findings of Fact and Conclusions of Law.

Filed: January 23, 1976.

The above-entitled cause came on regularly for trial on October 15, 1975, before the Honorable Robert G. Eckhoff, assigned, sitting without a jury, for the liability phase (Phase I) of the bifurcated trial heretofore granted on motion of defendants, relating to Causes of Action I and II, a ruling on said liability phase having been rendered in favor of the defendants on December 22, 1975. Said trial continued on January 5, 1976, before the said Honorable Robert G. Eckhoff, assigned, sitting without a jury, for the trial on the Causes of Action III, IV, and V. Plaintiffs appearing by their attorneys, Gerald B. Parent of Hatch and Parent, and Roger Sullivan of Thorpe, Sullivan, Workman, Thorpe & O'Sullivan, and defendants appearing by their attorneys, A. Barry Cappello, City Attorney, Frederick W. Clough, As-

sistant City Attorney, and Jeffrey D. Polisner of Bold and Polisner, and evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision and the Court now makes the following Findings of Facts and Conclusions of Law:

FINDINGS OF FACT.

1. Plaintiff Harold A. Toso has an equitable interest in the real property, commonly known as the "Wilcox Property" by virtue of his Agreement of Purchase and Sale dated November 30, 1973, and subsequent extensions thereto and as agent for the legal owners thereof and thus represented all the interests of the legal and equitable owners of the Wilcox Property in this action.

2. At all relevant times prior to the filing of the complaint herein, and thereafter, the applicable zoning designations for the Wilcox Property was E-1, single family residential, and R-1, single family residential, with R-H designation as to both said single family residential zoning designations.

3. The Santa Barbara City Zoning Ordinance provides for resort hotel use of residentially-zoned property where the proposed Resort Hotel plan complies with the Resort Hotel (R-H) Ordinance requirements and where the plot plan and the perspective renderings and elevations are found to insure the least possible conflict with or disturbance of the amenities attached to and associated with adjoining residential areas and are approved by the City Planning Commission and the City Council.

4. On or about February 6, 1974, Plaintiff Harold A. Toso submitted to the City of Santa Barbara Planning Commission a proposed plot plan for a Resort Residential Hotel along with an application to rezone the Wilcox Property to the Resort Hotel Overlay Zone.

5. Shortly after plaintiff submitted his application, defendants began pursuit of acquisition plans for the Wilcox Property.

6. Pursuant to the Requirements of the City Resort-Residential Hotel Ordinance, the City Planning Commission and the City Council were required to hold hearings before approving or denying an application for a Resort Hotel (R-H) overlay on residentially-zoned property.

7. At said hearings, the Planning Commission and the City Council were required by said Ordinance to take evidence pertaining to the specific plot plan and perspective renderings and elevations submitted and to make a discretionary decision based on the evidence submitted.

8. Following numerous public hearings on plaintiff's proposed plot plan and application for R-H zoning, said Planning Commission approved plaintiff's revised plot plan; however, it denied his application for R-H zoning.

9. Approval by the Planning Commission and the City Council of the proposed Las Positas Inn plot plan and perspective renderings and elevations constituted a determination that the Las Positas Inn project would have no significant adverse environmental effects and would insure the least possible conflict with or disturbance of the amenities attached to and associated with adjoining residential areas.

10. Defendants' pursuit of acquisition plans for the Wilcox Property continued simultaneously with Planning Commission and City Council hearings on the merits of plaintiff's application, and included a ballot proposition placed on the ballot by the City Council and approved by a majority of the City electorates on November 5, 1974, directing defendants to proceed with acquisition, and numerous widely publicized public meetings of the City Council concerning acquisition methods and plans.

11. Plaintiff Harold A. Toso appealed the denial of his application for R-H Overlay to the City Council of the City of Santa Barbara on or about October 25, 1974.

12. Immediately following the City electorates' approval of City purchase of the Wilcox Property and prior to denial of plaintiff's application, defendants, through their authorized representative, conducted active negotiations with plaintiffs for the purchase of the Wilcox Property. Said negotiations continued until February, 1975, when defendants privately expressed to plaintiff an unwillingness to condemn the property.

13. Defendants did not diligently attempt to conclude their negotiations for purchase of the Wilcox Property prior to conducting hearings on plaintiff's application, in that defendants never made an offer to plaintiff to purchase the Wilcox Property for a price based on the value ascertained by a final appraisal on the property and defendants never filed condemnation proceedings to acquire the property by eminent domain.

14. Following several public hearings, as prescribed by law, and several executive sessions, not prescribed nor authorized by law, defendants affirmed the denial of plaintiff's application for R-H overlay zoning.

15. Prior to rejection of plaintiff's application, City policy, as embodied in the General Plan and in staff reports and recommendations, was in favor of the concept of resort hotel use of the Wilcox Property, actual approval being contingent upon approval of a detailed site plan.

16. Prior to plaintiff's application for a Resort Hotel (R-H) overlay on that property commonly known as the Wilcox Property and the subject of this action, the policies of the City of Santa Barbara, exemplified by prior zoning

decisions, was to conform zoning to the General Plan designation.

17. The vast majority of those members of the public speaking in opposition to the proposed Resort Hotel Plan were doing so for the purpose of furthering the City's acquisition of the Wilcox Property.

18. The totality of the actions by defendant City, its Council, agents and employees which pertained to the Wilcox Property during the relevant times herein involved did have a detrimental affect on the Wilcox Property, its value, its use, and its marketability.

19. Throughout the period when defendants pursued their acquisition plans for the Wilcox Property, the City Council met illegally in secret session with certain City staff members to discuss said property.

20. During said secret sessions, the City Attorney and certain City Council members expressed ill-will toward plaintiff, his attorney, and their appraiser.

21. Defendant City Council intended that denial of plaintiff's application would prevent any development of said property prior to defendant's acquisition of the property.

22. Defendants' paramount consideration at all times was the acquisition of the Wilcox Property by a public agency as open space or as a park.

23. Defendants had a conflict of interest in the conduct of the hearings on plaintiff's application, which conflict deprived plaintiff of a fair trial (hearing).

24. Defendants had a personal bias and prejudice against plaintiff's interests which deprived plaintiff of a fair trial (hearing).

25. Defendants abused their discretion in that their findings are not supported by the evidence presented at the hearings on the plaintiff's application.

26. The relevant evidence overwhelmingly supports the application of a Resort Hotel (R-H) overlay on the Wilcox Property.

27. A Resort Hotel (R-H) overlay under the Santa Barbara City Zoning Ordinance is an exception to use and is not a rezoning, zoning change, or amendment to zoning law.

28. The defendants' decision denying the Plaintiff Harold A. Toso's rezoning application for a Resort Hotel (R-H) overlay was not a legislative act.

29. The application of a Resort Hotel (R-H) overlay to the Wilcox Property, once the Planning Commission had approved the plot plan and perspective renderings and elevations, although not a ministerial act, could be denied only for good cause, and this Court finds from all of the evidence before it that no such good cause existed or does exist at this time.

30. The Notice of Determination, EIR Project, No. 7-74 for the Las Positas Inn project, communicated to the County Clerk, Santa Barbara County, dated December 2, 1974, signed by Paul D. Nefstead, Environmental Hearing Officer, contains an erroneous entry, to-wit: The City Council has determined that the project "would" have a significant adverse effect on the environment.

31. The defendants' removal from the General Plan the Resort Hotel (R-H) designation for the Wilcox Property both from the map and from the text, was the result of an unlawful and illegal executive session, and was without notice, hearing or evidence to support the same.

32. The defendants met in executive session on August 5, 1975, to approve a resolution, Resolution 8111, to publicly revoke defendants' prior intent to acquire the Wilcox Property and to direct the Planning Commission to apply a Planned Unit Development (P.U.D.) overlay to the questioned property. The City Council approved said Resolution 8111 without holding public hearings and the Planning Commission subsequently complied with the Resolution.

33. Resolution 8111 was the first public announcement of abandonment of acquisition plans and contained inaccurate statements as to when such decision was made and what conduct had actually been taken towards acquisition by the City.

34. That the recommendation for a Planned Unit Development (P.U.D.)was inconsistent and directly conflicting with prior conduct of both the City Council and the Planning Commission regarding prior inquiries as to such type of overlay as to the Wilcox Property.

35. The evidence of this case clearly shows that next to a park or complete open space with a restriction of no development, the best environmental use of the Wilcox Property is that of a Resort Hotel constructed in accordance with a plot plan and perspective renderings and elevations approved by the City Planning Commission, and that single family residential construction or Planned Unit Development construction would be less environmentally desirable and would cause greater environmental detrimental impact.

36. On September 26, 1975, the Honorable Charles S. Stevens, Jr., Judge of the Superior Court, ruled on motions for partial summary judgment, that the Council of the City of Santa Barbara in referring the matter of the purchase of the Wilcox Property to the voters in the election held on

November 5, 1974, and the voters' majority vote in favor of said purchase did not amount to a resolution or an ordinance.

CONCLUSIONS OF LAW.

From the foregoing findings of fact, the Court makes the following conclusions of law:

1. The placing of the matter of the purchase of the Wilcox Property on the election ballot for the election held on November 5, 1974, and the voters' majority vote in favor of said purchase did not constitute a resolution or an ordinance as contemplated by eminent domain.

2. The actions, activities and decisions of the defendants, involving the Wilcox Property between February 6, 1974, and August 5, 1975, did not have the effect of a taking of said property as contemplated by the California Constitution, Article One, Section Nineteen (then Section Fourteen).

3. The actions, activities and decisions of the defendants, involving the Wilcox Property since February 6, 1974, did not result in a physical damaging of said property (as distinguished from market value depletion and marketability) as contemplated by the California Constitution, Article One, Section Nineteen (then Section Fourteen).

4. Plaintiffs have a fundamental vested right to not have their property taken without due process and without just compensation.

5. Plaintiffs have a fundamental vested right to a fair trial (hearing) on the merits of their application.

6. A Resort Hotel (R-H) overlay under the Santa Barbara City Zoning Ordinance is not subject to the laws, rules, and regulations governing rezonings, zone changes, and amendments of zone, as it is not a true Zoning Ordinance.

7. The defendants' decision to affirm the Planning Commission's denial of Plaintiff Harold A. Toso's zoning application was not a legislative act.

8. The hearings conducted and the decisions made by the Planning Commission and the City Council of the City of Santa Barbara on plaintiff's application for a Resort Hotel (R-H) overlay on the Wilcox Property were quasi-judicial hearings and decisions.

9. This Court's previous ruling on issues without substantial controversy, does not preclude this Court from finding that the City Planning Commission approval of the Las Positas Inn plot plan and perspective renderings and elevations did require the application of a Resort Hotel (R-H) overlay to the Wilcox Property based on all the facts before the Court.

10. That preparation and communication to the County Clerk, Santa Barbara County, of the Notice of Determination by the Environmental Hearing Officer, after a determination had been made by the City Council, is an act which the law specifically enjoins.

11. Approval by the Planning Commission and City Council of the proposed Las Positas Inn plot plan and perspective renderings and elevations constituted a determination that the Las Positas Inn project would have no significant adverse environmental effect and would insure the least possible conflict with or disturbance of the amenities attached to and associated with adjoining residential areas.

12. The actions of the City Council of the City of Santa Barbara on August 5, 1975, in passing Resolution 8111 was illegal and discriminatory and an abuse of the legislative discretion vested in the City Council.

13. The actions of the City of Santa Barbara in amending its General Plan to remove the Resort Hotel (R-H) des-

ignation from the Wilcox Property, both from the General Plan map and from the text of the General Plan was a result of illegal and discriminatory actions and was an abuse of the legislative discretion vested in the City Council.

14. The action of the City of Santa Barbara in passing Ordinance No. 3807, placing a Planned Unit Development (P.U.D.) Overlay on the Wilcox Property, was the result of illegal and discriminatory actions and was an abuse of the legislative discretion of the City Council.

15. Under all the facts of this case the Court is authorized by law to exercise its independent judgment on the evidence of the merits of the plaintiff's application and on the issues of conflict of interest and bias and prejudice.

16. The actions, activities and decisions of the City of Santa Barbara in dealing with the Wilcox Property since February 6, 1974, and the application of Harold A. Toso, were such as they:

(a) Did not grant plaintiff a fair trial (hearing);

(b) Did not proceed in the manner prescribed by law;

(c) Did not have substantial relevant evidence in the record of the administrative proceedings to support defendants' decision to affirm the Planning Commission's denial of plaintiff's application for Resort Hotel (R-H);

(d) Were decisions not supported by their findings;

(e) Did abuse their discretion.

17. Defendants' actions, activities and decisions, have violated the fundamental vested rights possessed by plaintiffs.

18. Defendant in affirming the Planning Commission's denial of plaintiff's Resort Hotel (R-H) rezoning application did abuse their discretion.

19. Defendants' denial of plaintiff's application was arbitrary, capricious, oppressive, unreasonable and in bad faith.

20. It is apparent from the testimony admitted in this case that it would be unfair and inequitable to remand plaintiff's application back to the City Planning Commission and City Council for rehearing, in that the City Planning Commission and City Council could not conduct a fair and impartial hearing on said application at this time or within the reasonable foreseeable future, regardless of how hard they may try.

21. There does exist a clear and present duty which mandamus will lie to enforce.

Judgment will therefore be entered accordingly.

Dated: January 23, 1976.

/s/ Robert G. Eckhoff
ROBERT G. ECKHOFF
ASSIGNED JUDGE OF THE SUPERIOR COURT.

Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-205
IN THE

Supreme Court of the United States

October Term 1980

HAROLD A. TOSO,

Petitioner,

vs.

CITY OF SANTA BARBARA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

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Questions Presented.

1. Has a state court reached a proper conclusion when it holds that public discussion of public acquisition of private property, in the absence of any governmental decision to purchase or condemn the property, does not constitute a compensable "taking" of private property for public use within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Has a state court reached a proper conclusion when it holds that the denial of an application to rezone private property (which it holds to be a reasonable land use decision supported by substantial evidence and after which the property retains reasonable uses and substantial economic value) does not constitute a "taking" of private property for public use within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution?

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No. 80-205
IN THE

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October Term 1980

HAROLD A. TOSO,

Petitioner,

vs.

CITY OF SANTA BARBARA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

Statement of the Case.

A. Preliminary Statement.

Petitioner's statement of the case is misleading and inaccurate in numerous instances. Therefore, respondent will set forth below a brief statement of the relevant facts from the record in this case. However, before doing so it should be emphasized that the trial court and the Court of Appeal, in its current opinion, both held that the evidence in this case has not established that the actions of respondent constitute a constitutional "taking" of petitioner's property. The California Supreme Court concurred in that conclusion by denying petitioner's petition for hearing.

It should also be pointed out that petitioner never alleged that any actions of respondent constituted a taking of property for public use in violation of the Fifth Amendment to the United States Constitution. The complaint alleged merely that the conduct of respondent resulted in a de facto

taking of property in violation of the Fourteenth Amendment to the United States Constitution.

Petitioner devoted considerable attention in his brief to the findings of fact adopted by the trial court and to the Court of Appeal's changed perception of the facts in its two opinions.

As for the findings of fact, the respondent has consistently contended in the California courts, and would so contend here, that those findings are without evidentiary support. In its opening brief to the Court of Appeal, respondent argued at length that 13 of the 36 findings of fact adopted by the trial court were not supported by substantial evidence.[1] The Court of Appeal recognized the validity of respondent's contention that there was no legal or evidentiary support for the trial court's finding of fact and conclusion of law that respondent had deprived petitioner of a fair hearing.[2] That the petitioner continues to urge in support of his case the trial court finding that he was deprived of a fair hearing, notwithstanding the recognition by the Court of Appeal of their lack of evidentiary foundation, is reason enough for this Court to decline review. *Southern Power Company v. North Carolina Public Service Company* (1924) 263 U.S. 508 (certiorari dismissed where factual dispute on question whether "evidence sufficed to establish actual dedication of petitioner's property to public use. . . ."). Respondent's challenge to the other findings of fact

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[1]Respondent contended in "Appellant's Opening Brief" that Findings of Fact 12, 14, 15, 17, 19, 21, 22, 23, 27, 28, 31, 32 and 34 were not supported by any substantial evidence.

[2]The Court of Appeal held that petitioner had not been deprived of a fair hearing. It stated as follows: "Appellant argues that, assuming that administrative mandamus was the proper remedy, the trial court erred in concluding that the City Council did not grant respondent a fair trial. Respondent stipulated that there had been no procedural due process violations, and there is no showing that the procedure itself was improper or unfair." (Pet. for Writ of Cert., App. A, p. 9).

were not considered by the Court of Appeal because it reversed, for other reasons, the portion of the judgment which was adverse to respondent.[3] Accordingly, petitioner's reliance on certain of those findings of fact should not be considered without viewing the record to determine whether said findings are supported by any substantial evidence (Clerk's Transcript, Volume I-V, pp. 1-1864; and Reporter's Transcript, Volume I-XI, pp. 1-3002).

As for the petitioner's comparison of the Court of Appeal's perception of the facts in its two opinions, that is completely irrelevant to the issue of whether this case presents any issues worthy of this Court's consideration. The first opinion was vacated by action of the California Supreme Court and is no longer a citable opinion in California.[4] In any event, the only opinion relevant for this Court's consideration is the February 6, 1980 opinion, the review of which is the stated subject of the Petition for Writ of Certiorari.

B. Statement of Facts.

Petitioner entered into an agreement to purchase the Wilcox Property, the subject of this action, in November 1973. Pursuant to the agreement, he was required to purchase the property only if the City approved his application to develop a resort hotel thereon. However, petitioner's right of purchase was not conditioned upon the approval of his resort hotel application. Pursuant to the agreement, petitioner could purchase the property at anytime prior to January 15, 1977 by paying the agreed upon purchase price.[5]

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[3]See Pet. for Writ of Cert., App. A, p. 11.

[4]California Rules of Court, Rules 976 and 977 prohibit the citation of a Court of Appeal opinion superseded by the granting of a hearing by the California Supreme Court.

[5]A copy of the Purchase and Sale Agreement and an amendment thereto are attached hereto as Appendix I.

In February 1974, petitioner filed an application with the respondent to rezone the property to place the resort hotel zone thereon. At the time of his application, the property was zoned single-family residential. The property was surrounded by land zoned for single-family uses. Upon receipt, the respondent began processing petitioner's rezoning application.

At the time of petitioner's rezoning application, the text of the respondent's General Plan included the following statement concerning a resort hotel use on the Wilcox Property:

> "The General Plan *suggests* as one of several *possibilities* other than single-family residential a resort-hotel in which the open quality of the land would be preserved." (Emphasis added).

In June, July and August 1974, as a result of public requests to consider public acquisition of the property, the City Council, during five City Council meetings, held public discussions concerning the possible acquisition of the property. *The City Council made no decision to acquire the property.*

On July 23, 1974, the City Council voted to place an advisory proposition on the November 1974 ballot to secure the voter's opinion of the question of whether the respondent should purchase the Wilcox property.

On June 6, 1974, the respondent's Planning Commission began its consideration of petitioner's rezoning application. At the commencement of the hearing, it was advised by the Assistant City Attorney that it should not consider the question of the public acquisition of the Wilcox Property, but rather was limited to determining whether or not, from a zoning and planning standpoint, the property should be rezoned to the resort hotel zone. The Planning Commission

chairman then stated that any speakers who talked about acquiring the land as a park would be ruled out of order. Consequently, during the Planning Commission hearings there was no consideration whatsoever of the public acquisition of the property.

On October 7, 1974, the Planning Commission determined that the intrusion of a commercial hotel into the single-family residential area surrounding the Wilcox Property was an improper land use and denied petitioner's rezoning application.[6]

On November 5, 1974, the voters approved the advisory ballot proposition by a vote of 13,422 to 11,402.

On November 12, 1974, the City Council commenced a hearing on petitioner's appeal of the Planning Commission's decision. At the commencement of the hearing, the City Attorney read a statement which had been approved by the City Council. Among other things, the statement provided that, based on legal instructions from the City Attorney, the City Council would totally divorce any individual desires to purchase the Wilcox Property from the hearing and would handle the appeal solely on its merits. *It also stated that the City Council had not decided to purchase or acquire the property.*

On November 26, 1974, at the conclusion of the hearing on petitioner's appeal, the City Council concluded that a resort hotel was not an appropriate land use of the property and denied petitioner's appeal. There was no consideration whatsoever during the hearing concerning public acquisition of the property.

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[6]A copy of the resolution of the Planning Commission denying petitioner's resort hotel application and setting forth the findings therefor is attached hereto as Appendix 2.

By letter dated February 3, 1975, *the City Attorney advised petitioner's attorney that the respondent did not intend to condemn the Wilcox Property* and that the petitioner and the legal owners were free to develop it under its existing single-family zoning.

On August 5, 1975, *the City Council adopted a resolution stating that it had no present or future intention of acquiring the Wilcox Property*.

On October 28, 1975, the City Council rezoned the Wilcox Property to place the Planned Unit Development (PUD) zone thereon as an alternative zone so that it would be developed either as a planned unit development or as a single-family subdivision under its existing single-family residence zoning.

At the time of trial, the property was worth at least $600,000 under its existing zoning, according to petitioner's appraiser.

Petitioner failed to exercise his right to purchase the Wilcox Property and develop it as a PUD or single-family residence subdivision, and his right to purchase expired on January 15, 1977.

During the trial, a senior planner of the Regional Coastal Commission in charge of the review of projects in Santa Barbara testified that the Regional Coastal Commission staff had not formed any opinion concerning the appropriate use of the subject property.

On February 26, 1980, respondent approved the subdivision of the subject property into 68 residential lots.[7]

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[7]A copy of the Resolution of the City Council of respondent approving the subdivision is attached hereto as Appendix 3.

Summary of Argument.

1. The petitioner asserts that this is an appropriate case for this Court to determine the issue left unresolved by this Court in *Agins v. City of Tiburon* (1980) 24 Cal.3d 266; affirmed, 100 S.Ct. 2138. That issue is whether invalidation is the only remedy available to a person whose land has been taken without just compensation through an exercise of the police power which deprives the land of all reasonable and beneficial uses.

The petitioner's assertion is not well founded since in the instant case, the actions of respondent of which petitioner complains did not deprive the subject property of all reasonable use and value. The property still retains the single-family residential zoning it possessed at the time petitioner applied to respondent to have the property rezoned to permit his proposed resort hotel development. In addition, the property possesses an alternative zoning which would permit it to be developed as a planned unit development. These are reasonable uses. At the most, respondent's action merely caused a diminution in the value of the subject property since petitioner's appraiser testified at trial that the property was worth $600,000. A diminution in the value of private property caused by a zoning action which does not deprive the property of all reasonable use and value has never been held to constitute a taking of private property prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

2. Petitioner asserts that since the Court of Appeal reversed the portion of the trial court's judgment which ordered the subject property rezoned to the resort hotel zone, there is no remedy for petitioner.

The Court of Appeal held there was no remedy because respondent's action in denying an application to rezone the

subject property to permit the construction of a commercial hotel in an area zoned and developed with residential uses was both reasonable and supported by substantial evidence. The Court of Appeal held there was no taking as a result of the zoning action because the property retained reasonable use and economic value. In summary, petitioner has no remedy simply because he was not legally entitled to one.

3. The fact that petitioner did not exercise his right to purchase the subject property is presented by petitioner as evidencing that there has been a "taking" of a property right by respondent.

Petitioner had no vested right to build a resort hotel on the subject property. Therefore, the respondent's refusal to grant his rezoning request did not deprive him of any property interest. His right to purchase the property was not contingent upon the approval of the resort hotel rezoning application. He could have purchased the property at any time until January 15, 1977 by paying the agreed upon purchase price to the owners. The fact that petitioner decided not to follow through with his purchase and develop it with a single-family subdivision or a planned unit development, uses which have substantial value, certainly does not establish a "taking" by respondent.

4. Petitioner contends that this Court should use the instant case to resolve the conflict between the courts of various states as to what constitutes a de facto taking of private property by governmental action.

A resolution of that conflict will not benefit petitioner since California is already amongst the majority of jurisdictions which provide compensation for de facto takings, and the Court of Appeal opinion holding that respondent's actions do not constitute a de facto taking are consistent with both California case law and this Court's opinion in

Agins v. City of Tiburon, supra. Respondent's consideration of the acquisition of the subject property lasted less than eight months and resulted in a decision *not* to acquire the property. None of the cases cited by petitioner can be construed as even remotely suggesting that the respondent's actions constitute a de facto taking or other compensable precondemnation activity.

5. The instant case is clearly distinguishable from *San Diego Gas and Electric Company v. City of San Diego*, No. 79-678, in which an appeal is presently pending before this Court. That appeal involves the issue of whether the sole remedy for a zoning action which a trial court has held deprived private property of all practical, beneficial or economic use is invalidation, rather than damages for inverse condemnation. In the instant case, the zoning action did not deprive the property of all practical, beneficial or economic use. The subject property herein retains the reasonable and economic uses of single-family subdivision or planned unit development. Accordingly, this case will not be affected by whatever action this Court takes in *San Diego Gas and Electric*.

ARGUMENT.

I.

The Lower Court Decision Neither Conflicts With Any Federal or State Court Decisions, nor Raises Any Important Questions of Federal Law.

A. The Lower Court Decision Correctly Concludes That Petitioner Is Not Entitled to a Remedy Because the Subject Property Has Not Been "Taken" and Because the Challenged Action Was Reasonable and Supported by Substantial Evidence.

Petitioner argues that this case is significant because it is the first California case following *Agins v. City of Tiburon* (1980) 24 Cal.3d 266, affirmed, 100 S.Ct. 2138, in which

a property owner has received the remedy of invalidation from the trial court only to have it taken away by an appellate court. The result proclaims petitioner is that what he refers to as the "aggrieved landowner" has no remedy. However, petitioner has overlooked the obvious. The petitioner has no remedy because there has been neither a "taking" of the property nor any unreasonable exercise of the police power by respondent.

The California Supreme Court, in *Agins v. City of Tiburon, supra*, held that if the exercise of the police power deprived the property of all economic use, it was unconstitutional as a "taking" and that the proper remedy was to invalidate the governmental action. However, in the instant case, respondent did not exercise its police power in a manner which deprived the subject property of all economic value or reasonable uses. At most, respondent's refusal to rezone the property to the resort hotel zone merely diminished its value. It retained its single-family residential zoning, which is a reasonable use for the property. In fact, the property recently has been subdivided for that purpose. Petitioner's appraiser testified that the property at the time of trial had a value of $600,000. This Court has uniformly rejected the proposition that diminution in property value caused by an exercise of the police power constitutes a "taking" of property under the United States Constitution. *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926); *Hadachek v. Sebastian* 239 U.S. 394 (1915); *Goldblatt v. Hempstead* 369 U.S. 590 (1962); *Penn Central Transp. Co. v. New York City* 438 U.S. 104 (1978).

The fact that the subject property may be more valuable with resort hotel zoning does not mean that respondent's failure to rezone the property constitutes a taking. *United States v. Central Eureka Mining* (1958) 357 U.S. 155, 167; *Steel Hill Development, Inc. v. Town of Sanbornton* 490

F.2d 956, 963 (1972, 1st Cir.); *C. F. Lytle v. Clark* 491 F.2d 834, 838 (1974, 10th Cir.); *South Terminal Corp. v. Environmental Protection Agency* 504 F.2d 646, 678 (1974, 1st Cir.); *De-Tom Enterprises, Inc. v. United States* 552 F.2d 337 (1977, Ct. Cl.).

Petitioner places great emphasis on the fact that he did not exercise his right to purchase the subject property and that said right expired on January 15, 1977. Therefore, even if the Court of Appeal had affirmed the trial court's decision requiring the respondent to rezone the subject property, that remedy would not have benefited petitioner. Although it is not entirely clear from the petition, it appears that petitioner is contending that his decision not to exercise his right to purchase the property, purportedly because he could not develop it as a resort hotel, constitutes a taking by respondent of his interest in the property. Such a result would place the holder of an unexercised right to purchase real property in a better position than the legal owner. The legal owner does not have a cause of action for a "taking" because the property retains reasonable and beneficial uses. Certainly, the petitioner who has failed to exercise his right to purchase the property and develop it as single-family subdivision or planned unit development cannot bootstrap himself into a "taking" by that failure. A similar argument was rejected in *Southpark Square Ltd. v. City of Jackson* 565 F.2d 338 (1977, 5th Cir.), cert. den. 436 U.S. 946. In that case, plaintiff contended that the city's denial of a building permit, which ultimately resulted in its loss of the property for inability to obtain financing, was a compensable taking. The Court of Appeal concluded that the plaintiff "lost its property as a direct consequence of its own financial arrangements and tactical decision, not because the City committed any act remotely resembling a taking" (p. 343). That reasoning is equally applicable to the instant case.

B. The Lower Court's Decision Does Not Conflict With This Court's Holdings in Nectow v. Cambridge or in Arlington Heights v. Metro Housing Corp.

Petitioner argues that the lower court's decision defies this Court's decisions in *Nectow v. Cambridge* 277 U.S. 183 (1928) and in *Arlington Heights v. Metro Housing Corp.* 429 U.S. 252 (1977). Petitioner's contentions are both misleading and without merit.

In *Nectow v. Cambridge*, this Court merely held that a zoning ordinance which did not permit any practical use of private property was invalid. The lower court decision does not conflict with that holding since the respondent's denial of petitioner's resort hotel zoning application did not affect the existing single-family residential zoning on the property which was clearly a reasonable and economic use of the property.

Petitioner's statement, at p. 14 of his petition, that the trial court's findings show actions aimed at the improper purpose of facilitating cheaper acquisition of the subject property by respondent is false. As stated by the lower court (Petition for Writ of Certiorari, Appendix A, p. 23), the trial court did not find that any actions of respondent were intended to freeze or lower the value of the land in order to permit its purchase at a lower price.

Next, petitioner argues that the lower court decision conflicts with this Court's decision in *Arlington Heights v. Metro Housing Corp., supra,* because it holds that if there is any reasonable basis for a zoning decision, the motives or intentions of the local legislative body cannot be inquired into. Petitioner represents that *Arlington Heights* stands for the proposition that judicial inquiring into the motives or intentions of local legislators in making zoning decisions is proper. Petitioner's contention in this regard is very de-

ceptive, and his quotation of selected language from the opinion is extremely misleading. In *Arlington Heights*, the plaintiff alleged that the local legislative body's denial of its rezoning request was racially discriminatory. This Court's statement at 429 U.S. at 266 (Petition for Writ of Certiorari, p. 15) concerning judicial inquiry into legislative motivation in zoning actions was limited to the issue of racial discrimination. This is clear from the following language from this Court's opinion immediately preceding and immediately following that quoted by petitioner on page 15 of the petition, which petitioner conveniently omitted:

> "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.[11] In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But *racial discrimination* is not just another competing consideration. . . ." (quotation in Petition omitted).
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> "The impact of the official action—whether it bears more heavily on one race than another." (Emphasis added).

Outside the limited area of alleged racial discrimination, this Court has consistently held that motives or intentions of legislators are irrelevant for determining the validity of their actions.[8]

Moreover, contrary to petitioner's contention, the lower court decision does not hold that inquiry into legislative

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[8]*Soon Hing v. Crowley* (1885) 113 U.S. 703, 710-711; *United States v. Morgan* (1941) 313 U.S. 409, 422; *United States v. O'Brien* (1968) 391 U.S. 367, 383.

motivation in zoning actions allegedly taken to depress the value of private property pending public acquisition is prohibited. Rather, it concludes that since there was no showing or finding in the instant case that respondent's actions were intended to freeze or lower the value of the subject property in order to purchase it at a reduced price, it did not have to resolve that question. (Pet. for Writ of Cert., App. A, p. 23).

This Court's consideration of the issue of the propriety of judicial inquiry into legislative motivation in inverse condemnation cases would have no bearing on this case since the trial court permitted such inquiry, but did not find that respondent's actions were motivated by a desire to depress the value of the subject property pending public acquisition.[9]

In summary, the remedy for exercises of the police power which deprive private property of all reasonable uses and economic value clearly exists in California. As stated by the California Supreme Court in *Agins v. City of Tiburon, supra,* that remedy is invalidation. The fact that the lower court decision herein did not provide a remedy for petitioner is not evidence that the holding in *Agins* is improper. The petitioner has no remedy because his property was not "taken." At most, respondent's actions caused merely a diminution in the value of the subject property since the denial of petitioner's rezoning application continued the existing single-family residential zoning on the property which is a reasonable and economic use for the property. In addition, respondent gave the property the additional alternative use of planned unit development.

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[9]The trial court had permitted significant inquiry concerning City Council motivation. Every member of the City Council was required to testify during the trial.

C. The Lower Court's Decision Is Consistent With This Court's Decision in Agins v. City of Tiburon.

In *Agins v. City of Tiburon, supra*, the plaintiff, *inter alia*, contended that certain precondemnation activities of the city constituted a "taking." The California Supreme Court rejected this contention, stating:

> "It is manifest that general land-use planning discussion and related decision making by elected officials must be both unhampered and public. Together or singly, neither process constitutes a 'taking' of the property under consideration. Any other conclusion would violate sound public policy." (p. 278).

This Court, in affirming the California Supreme Court's decision, stated in footnote 9 to its opinion that the California Supreme Court correctly rejected the Agins' contention that the city's precondemnation activities constituted a taking. This Court further stated:

> "Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceedings, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." [*Agins v. City of Tiburon* (1980) 100 S.Ct. 2138, 2142.]

This holding is equally applicable to the instant case since the precondemnation activities alleged in *Agins* were much more extensive and had a more adverse impact than the actions of respondent which petitioner contends constitutes inequitable precondemnation activities. This is apparent from the following brief review of the facts in *Agins:*

a. In January 1972, the city retained two private consultants, Dean Witter and Williams & Moline, to prepare reports concerning open space acquisition by the city;

b. In July 1972, the city received a report from Dean Witter, a financial consultant, that recommended that the purchase of open space land by the city be financed through the issuance of $1.25 million of general obligation bonds;

c. In October 1972, the city received a report from Williams & Moline, a planning consultant, which focused on possible land use designations *and* recommended that the city attempt to acquire the Agins' property, along with other property, for open space purposes;

d. In October 1972, at an election, the city passed an open space bond issue in the amount of $1.25 million and proceeded to sell the bonds;

e. On June 28, 1973, the city adopted an open space ordinance which downzoned the Agins' property;

f. On December 4, 1973, the city filed an eminent domain action to acquire the Agins' property;

g. On November 1, 1974, the city abandoned its eminent domain action.

By way of comparison, in the instant case, respondent's City Council held five public hearings concerning the possible acquisition of the property which did not result in a decision to acquire the property. It then placed on the ballot an advisory proposition concerning the purchase of the property which passed by a small margin. Finally, it denied petitioner's application to *upzone* the property from single-family residential to a resort hotel zone. Prior to denying the application, the City Council stated that it had made no decision to acquire the property. On February 3, 1975, the City Attorney advised petitioner's attorney by letter that the City did *not* intend to condemn the property and that he and

the legal owners were free to develop it under its existing single-family zoning.

These events all took place in the seven and one-half month period from June 11, 1974, when the first City Council consideration of acquisition took place, until February 3, 1975, when petitioner was advised that the City did not intend to condemn the property. The City Council *never* decided to acquire the property.

In comparing the facts in *Toso* to those in *Agins*, the following is apparent:

a. In *Agins*, the period of public consideration of acquisition was much longer than in *Toso* (13 months versus 7½ months).

b. In *Agins*, a decision to condemn was made whereas no such decision was made in *Toso*.

c. In *Agins*, the property was downzoned after being designated for acquisition whereas in *Toso*, the City refused to upzone the property and never designated the property for acquisition.

From this analysis, it is apparent that the city's actions in *Agins* were much more adverse to the property owner than those in *Toso*, but were held by this Court not to constitute inequitable precondemnation activities. It follows, therefore, that the lower court's decision in the instant case is entirely consistent with this Court's decision in *Agins* and that the actions of respondent do not constitute a "taking."

D. The Lower Court Decision Is Consistent With California Case Law Which Has Provided as Much Protection for Private Property Owners From Governmental Acquisition Activities as Any State Court or Federal Circuit in the Country.

Finally, petitioner contends that this Court should use the instant case as a vehicle for resolving the conflict which

petitioner believes exists between decisions of the courts of various states as to what constitutes a de facto taking of private property by governmental action. In essence, petitioner is asking this Court to resolve the conflict between the state courts on this issue by holding that those jurisdictions which follow the holding in *City of Buffalo v. J. W. Clement, Inc.* (1971) 28 N.Y.2d 241, that there can be no de facto taking for precondemnation activities, are in violation of the U.S. Constitution. Such a decision will not benefit petitioner because, as explained below, California courts have *not* followed *Clement* and *do* provide compensation for de facto takings.

The courts in California have provided greater protection for private property owners from governmental acquisition activities than those of practically any state or federal circuit in the country. In California, a property owner is compensated for de facto takings caused by precondemnation activities (*Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845). If a condemnation action is filed, his property is valued as though any governmental action which was taken to diminish its value did not occur (*People Ex Rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525). If a governmental agency states its intention to condemn property and then acts unreasonably by excessively delaying the eminent domain action or by other oppressive conduct, the property owner is entitled to be compensated for any diminution in value caused thereby (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39). Against the background of these cases, the lower court decision herein has concluded that there has been no "taking" by respondent and the California Supreme Court has concurred in that result by denying petitioner's petition for hearing.

In addition, the facts of cases cited by petitioner on pages 17-19 of his petition bear no more resemblance to those of

the instant case than does an elephant resemble a flea. Of the 15 cases cited by petitioner as providing compensation for de facto takings, 10 involved either redevelopment projects in which the subject property was designated for acquisition for periods ranging from 3½ years (*Maxey v. Redevelopment Authority* (1980) 288 N.W.2d 794) to 10 years (*Foster v. Detroit* 405 F.2d 138 (6th Cir. 1968)) or highway projects for which the subject property was designated for acquisition for similar extended periods of time. In the instant case, respondent has never designated the subject property for acquisition. As stated by Washington Supreme Court in *Lange v. State* (1976) 547 P.2d 287, 288, in order for there to have been a de facto taking "the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land."[10] In addition, in the cases cited by petitioner, the government actions rendered the subject property practically valueless. In the instant case, the property has substantial value and reasonable uses.

The other five cited cases are also inapposite. *Peacock v. County of Sacramento, supra*, is a California case in which the plaintiff was denied any beneficial use of his land for five years while the County designated the property for acquisition as a part of a planned airport expansion. *United States v. Certain Lands In Truro etc.* 476 F.Supp. 1031 (1979, D. Mass.) is not a de facto taking case, but rather a case in which the court held that the plaintiff's land in a federal eminent domain action should be valued pursuant to the zoning it had held prior to being downzoned at the request of the federal government. In *Drakes Bay Land Co. v. United States* 424 F.2d 574 (1970, Ct. Cl.), the actions

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[10]Even the enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail. *Danforth v. United States*, 308 U.S. 271, 288.

of federal employees over a seven-year period which deprived the plaintiffs of any reasonable use of their property were held to constitute a taking. In *Benenson v. United States*, 598 F.2d 939 (1977, Ct. Cl.), the actions of the defendants in prohibiting remodeling or demolition of the building on plaintiff's property while considering its acquisition over a four-year period were held to constitue a taking of all beneficial use of the property.

In *City of Austin v. Teague* 570 S.W.2d 389 (1978, Tex.), the city's denial of three successive development permits applied for by the property owner over a two-and-one-half-year period, which were consistent with existing zoning, was held to constitute the temporary acquisition of a scenic easement. In the instant case, the respondent did not deny a development permit for a use permitted by the existing zoning, but rather denied a request to upzone the property.

The Court's attention is directed to the case of *Briggs v. State of California* 98 Cal.App.3d 190; app. dism. 100 S.Ct. 3005. In *Briggs*, a coastal permit, which was a prerequisite to any development on the property, was denied by the State Coastal Commission on August 8, 1973. This action followed a communication from the Director of Parks and Recreation of the State of California that a site was desirable for State acquisition. This was followed by two years of acquisition discussion between representatives of the property owner and of the state after which the plaintiff filed an inverse condemnation action contending that the permit denial, coupled with the state official's statement that the property was desirable for acquisition, constituted a taking or damaging of the subject property. The state subsequently filed an eminent domain action to acquire the property which was stayed pending resolution of the inverse condemnation action. The Court of Appeal held that there was no taking or damaging in that: (1) the coastal permit was denied for

reasons independent of the state's acquisition interest and (2) the state's expression of interest in acquisition did not constitute a statement of intention to condemn. (See also *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App.3d 932, 945-948; *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 677; *City of Walnut Creek v. Leadership Housing Systems, Inc.* (1977) 73 Cal.App.3d 611.) Similarly, in the instant case, the reasons for respondent's denial of the petitioner's rezoning application were completely independent of any acquisition consideration (see Appendix 2) and the respondent never stated any intention to condemn the property.

Petitioner has not cited any case in which public consideration of public acquisition of private property which is concluded in less than eight months with a decision by a public entity *not* to acquire the property and with the property owner being advised that he is free to develop the property under the existing zoning has been held to constitute a "taking" of property for public without just compensation within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. A holding that such action constituted a taking would stifle the receipt of public input and citizens' views concerning public acquisition of private property which is essential in a democratic society.

E. The Instant Case Is Clearly Distinguishable From San Diego Gas and Electric Company v. City of San Diego.

The case of *San Diego Gas and Electric Company v. City of San Diego*, No. 79-678, in which an appeal is presently pending before this Court, raises the legal question, not answered by this Court in its opinion in *Agins, supra*, of whether the sole remedy available to a property owner whose property has been deprived of all reasonable use and eco-

nomic value by an exercise of the police power is invalidation of the action, rather than damages for inverse condemnation.

In *San Diego Gas and Electric*, through a downzoning and general plan amendment, the city changed the uses permitted on the subject property from industrial to agricultural open space. Although the property owner never applied to the city for approval of any development on the property, the trial court found that the actions of the city deprived the plaintiff of "all practical, beneficial, or economic use of the property."

Since the plaintiff in *San Diego Gas and Electric* never submitted a development plan for approval, the issue of exhaustion of administrative remedies presents a significant preliminary legal issue for resolution by this Court. However, assuming the appellant is able to overcome that threshold, and perhaps insurmountable problem, that case is closer to a proper vehicle for resolution of the question left undecided by this Court in *Agins* since there was a trial court finding that the property had no practical, beneficial or economic use. On the other hand, the instant case in a case involving a diminution in value, not the deprivation of all reasonable use or economic value. As discussed previously, the property can be developed either as a single-family subdivision or as a planned unit development, both of which are reasonable uses. Respondent did not downzone the property, but rather refused to upzone it to permit a commercial use in a residential neighborhood. Petitioner's expert testified at trial in 1974 that the property had a value of $600,000.

This case involves the issue of whether public discussion of acquisition not culminating in a governmental decision

to acquire constitutes a taking of private property. For that reason, the case is clearly distinguishable from *San Diego Gas and Electric*.

Conclusion.

The petitioner has neither shown a conflict between the lower court decision and any federal or state court decision nor raised any important question of federal law. The petitioner is merely a disgruntled developer who was unable to secure the rezoning of land which he did not own to facilitate his desired type of development on the land in the event he decided to purchase it. The lower court's decision that the action of respondent in denying petitioner's rezoning request was a reasonable land use decision which did not deprive the property of a reasonable and beneficial use and was not a taking is fully consistent with applicable decisions of this Court. Respondent's consideration of acquisition of the property over a less than eight-month period is merely an example of governmental decision making which this Court has held is not a "taking" in *Agins v. City of Tiburon, supra*.

For the reasons stated herein, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

FREDERICK W. CLOUGH,
City Attorney,
Attorney for Respondent.

APPENDIX 1.

Agreement of Purchase and Sale.

THIS AGREEMENT is made November 30, 1973 by and between Whitney A. Collins, trustee u/w Margaret Whitney Wilcox; Whitney A. Collins, trustee u/w Roy F. Wilcox; Dede Wilcox Eddy; Denis H. Wilcox; Richard K. Wilcox; Julia Collins Haselton; Crocker National Bank, successor trustee u/w Margaret Whitney Wilcox; and Crocker National Bank, successor trustee u/w Roy F. Wilcox; all hereinafter collectively referred to as "Sellers" and Harold A. Toso, hereinafter referred to as "Buyer".

1. *Sale and Purchase.*

Sellers agree to sell to Buyer and Buyer agrees to buy from Sellers, subject to the terms, provisions and conditions of this Agreement, all of that certain real property more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof.

2. *Consideration.*

Buyer shall pay to Sellers as and for the purchase price of the above described real property herein agreed to be sold and purchased (hereinafter sometimes referred to as "said real property") the total sum of One Million Two Hundred Thousand Dollars ($1,200,000.00), (subject to any adjustment pursuant to Paragraph 10) which said purchase price shall be payable as follows:

(a) On or before January 15, 1974 Buyer shall pay to Sellers outside of escrow a sum equal to two-twelfths (2/12) of the total amount of all city, county and special district taxes, levies and assessments as shown on the 1973-1974 tax statements for said real property, and thereafter on or before the fifteenth day of each and every calendar month until the escrow hereinafter provided for shall close or shall terminate without closing

in accordance with the provisions of this Agreement, Buyer shall pay to Sellers outside of escrow a sum equal to one-twelfth (1/12) of the total amount of such taxes, provided, however, that for any month after the 1974-1975 tax statements are received by Sellers said sum shall be one-twelfth (1/12) of the amount of taxes, levies and assessments shown thereon.

If said escrow shall close in accordance with the terms hereof, all sums paid by Buyer to Sellers outside of escrow pursuant to the provisions of this subparagraph (a) shall be credited to said purchase price.

(b) Upon the close of the escrow hereinafter provided for there shall be paid to Sellers the full amount of said purchase price less the credit for sums theretofore paid by Buyer to Sellers outside of escrow in accordance with the provisions of the preceding subparagraph (a) of this Agreement.

3. *Escrow.*

Upon the execution of this Agreement the same shall become a binding contract of purchase and sale upon the terms hereof and the parties shall in pursuance thereof forthwith enter into an escrow agreement with Crocker National Bank as escrow holder, executing the usual form of instructions employed by said escrow holder, calling for the performance of this Agreement in accordance with its term, provisions and conditions and within the period of time provided herein. All documents and payments required of the parties (excepting payments herein provided to be made to Sellers outside of escrow) shall be delivered into such escrow. Said escrow instructions shall be and shall be therein expressly stated to be for the purpose of implementing this Agreement of Purchase and Sale and shall not be deemed to modify or affect the terms hereof.

Said escrow shall close on or before sixty (60) days after Buyer shall have received the approval of the City of Santa

Barbara and any and all other governmental bodies, agencies and commissions whose approval is necessary for the Buyer's development of said real property in accordance with Paragraph 14 and the times for filing of a referendum petition to overturn any such approval and for appeals from any action with respect to such development by any governmental body, agency or commission have expired, but in no event later than November 30, 1974, except as extended as hereinafter provided.

If, on November 30, 1974, all approvals provided for by the preceding paragraph shall have been received, but the times for filing such a referendum petition and any such appeal shall not have expired, and Buyer shall not be in default of any obligation under this Agreement, Buyer shall have the right to extend said escrow until thirty (30) days after the expiration of the times for filing such a petition and any such appeal; or if any such appeal shall be filed prior to the expiration of the time therefor, then Buyer shall have the right to extend said escrow until the action from which such appeal was taken shall have become final; but during any such period of extension Buyer shall continue to make the payments to Sellers required by subparagraph (a) of Paragraph 2.

Anything in the foregoing provisions of this Paragraph 4 to the contrary notwithstanding, in no event shall the time for the close of said escrow continue beyond January 15, 1977.

Buyer shall have the right to cause said escrow to close at any earlier time than as specified in this Paragraph 3 by so notifying the Sellers and the escrow holder and by depositing the sums and documents required therefor by the provisions of Paragraph 2 of this Agreement.

4. *Title Insurance.*

Sellers shall furnish and pay for a standard owner's policy of title insurance issued by Security Title Insurance Company and to be in the face amount of One Million Two Hundred Thousand Dollars ($1,200,000.00). Buyer acknowledges that he has examined Security Title Insurance Company's Preliminary Report bearing its Number 169577 as of January 3, 1972, which said Preliminary Report covers said real property, and Buyer expressly agrees to accept title to the said real property and said policy of title insurance shall show title thereto to be vested in the Buyer subject to current taxes and all other matters shown in said Preliminary Report. Sellers agree that prior to the close of the escrow hereunder the existing lease of a portion of said real property to Keeline-Wilcox Nurseries, Inc. will be cancelled.

5. *Prorations.*

All real property taxes, assessments and rents affecting said real property shall be prorated as of the close of escrow.

6. *Entire Document.*

This document constitutes the entire agreement between the parties and there are no oral agreements. This Agreement may be modified only in writing.

7. *Charges.*

Sellers shall pay one-half (½) of the escrow fee, all of the cost of the preparation of the Deed and all of the cost of necessary documentary stamps thereon. Buyer shall pay one-half (½) of the escrow fee, the cost of the preparation of the Deed of Trust and all recording costs.

8. *Benefit and Assignment.*

Buyer shall have the right to assign or transfer his rights hereunder but no such assignment shall relieve the Buyer of any obligation or liability hereunder.

This Agreement shall inure to the benefit of and shall bind the respective heirs, successors and assigns of the parties hereto, as the case may be.

9. *Other Instruments.*

The parties hereto agree to execute the escrow instruction hereinabove provided for and any and all other documents necessary or appropriate for the carrying out of the purposes of this Agreement.

10. *Default by Seller.*

If, prior to the time hereinabove provided for the close of escrow, title to said real property shall not in the condition as hereinabove in Paragraph 4 required, then unless Buyer elects to accept and approve such title as shall then be in Sellers this Agreement shall cease and terminate as to any obligation of either party to the other and shall be deemed cancelled and void by mutual consent without liability of either party to the other, and in such event all sums and instruments deposited in said escrow by Buyer and paid by Buyer to Sellers outisde of escrow pursuant to the provisions of this Agreement shall be returned to Buyer.

Anything in this Paragraph 10 to the contrary notwithstanding the purchase by the County of Santa Barbara prior to close of escrow pursuant to the option provisions of the lease referred to in Exception No. 13 of the Preliminary Report hereinabove referred to shall not constitute a defect in the condition of title under the provision of this Paragraph 10 or of Paragraph 4, and this Agreement shall not be deemed terminated or cancelled by reason thereof, and this Agreement shall be and remain in full force and effect and shall be performed by the parties in all other respects. In such event, however, the purchase price provided for by Paragraph 2 of this Agreement shall be reduced by the amount of the net proceeds received by Sellers upon such

purchase by the County of Santa Barbara and the property so purchased by the County of Santa Barbara shall be excluded from the property to be sold and purchased hereunder.

No voluntary change shall be made by Sellers in the condition of the title of said real property between the date hereof and the close of escrow from that provided for by Paragraph 4 hereof.

11. *Destruction or Damage.*

No damage to said real property or any part thereof prior to the close of escrow shall relieve Buyer of any duty, obligation or liability arising hereunder.

12. *Engineering and Planning Studies.*

Sellers are in possession of certain engineering and planning studies heretofore made with regard to said real property. Sellers agree to deliver to Buyer at no charge to Buyer copies of all of such studies.

13. *Default by Buyer.*

If Buyer shall fail to perform as required hereunder for any reason whatsoever other than as expressly permitted by the terms of this Agreement, or fail or refuse to comply with said escrow instructions, or fail to purchase said real property in accordance with the terms hereof, it is expressly understood and agreed that all sums paid by Buyer to Sellers outside of escrow in accordance with the provisions of Paragraph 2 hereof shall be retained by Sellers.

Sellers and Buyer further expressly agree that said sums have been agreed upon as liquidated damages to be retained by Sellers in any of such events in order to avoid the costs, expenses, delays and uncertainties of litigation and, further, because it is agreed that it would be impractical and extremely difficult to ascertain the amount of money damages which would otherwise be allowable to Sellers for Buyer's

default because of the difficulty of establishing all of the relevant factors bearing thereon, such as but not limited to the dynamic character and resulting fluctuations of the price of real property at this time; the absence of other similar property in or near the location of said real property; the period for which Sellers are obligated to remove said real property from the market hereunder; and the unique value to Sellers of the terms of this Agreement over other offers received by Sellers for the purchase of said real property.

14. *Development Plans and Governmental Approvals.*

As soon as practicable after the execution of this Agreement Buyer shall commence and proceed with diligence with the preparation of a development plan for said real property.

As soon as practicable Buyer shall commence and shall proceed with diligence with all necessary applications and proceedings to and before the City of Santa Barbara and any and all other appropriate governmental bodies, agencies and commissions necessary for the development of said real property in accordance with said development plan.

Sellers agree to cooperate with Buyer in all such applications and proceedings and shall execute any documents which may be necessary therefor. Buyer shall pay all fees and charges incurred in connection with such applications and proceedings and shall save and hold Sellers and each of them harmless from any and all liability, cost and expense in connection with such applications and proceedings.

Buyer shall give to Sellers monthly written reports on the status of all such applications and proceedings.

If at any time prior to the close of the escrow hereunder and notwithstanding the exercise by Buyer of diligence in his efforts to obtain the necessary approvals of the City of Santa Barbara and of any and all other governmental bodies,

agencies and commissions for the development of said real property in accordance with said development plan, any such necessary approval shall have been denied, or any such approval shall have been overturned upon a referendum election, Buyer shall be entitled to terminate said escrow by written notice delivered to Sellers and upon such notice this Agreement shall cease and terminate as to any obligation of either party to the other and shall be deemed cancelled and void by mutual consent without liability of either party to the other, provided, however, that in such event Sellers shall nevertheless retain all sums theretofore paid by Buyer to Sellers outside of escrow as consideration for entering into this Agreement.

15. *Reservation of Mineral Rights.*

The Deed from Sellers to Buyer hereunder shall reserve to Sellers, their heirs, successors and assigns, in undivided interests in the fractions set forth opposite their signatures to this Agreement, all oil, gas, petroleum, minerals, hydrocarbon substances and kindred substances deposited in, lying under or flowing through said real property, other than as already excepted therefrom as set forth in Exhibit "A", together with the right to directionally drill, mine, operate and produce from lands other than said real property, oil and gas wells, tunnels and shafts into, through and across the subsurface of said real property without, however, the right to the use of or to pass through the surface or subsurface areas of said real property to a depth of 500 feet, measured vertically from the surface of said real property.

16. *Negation of Representations.*

Buyer certifies that he has inspected said real property either personally or through duly authorized agents and that this Agreement is entered into by him as a result of said inspection and not upon any representation made by Sellers

or any of them or of any of their representatives or of any selling agent. Sellers expressly make no representation with regard to the size or boundaries of said real property.

17. *Notices.*

Any notice required or desired to be given by Sellers to Buyer, or by Buyer to Sellers, shall be deemed properly given if by Sellers when enclosed in a sealed envelope addressed to Buyer at 737 Sea Ranch Drive, Santa Barbara, California 93110, and deposited in the United States mails, postage prepaid, and if by Buyer when enclosed in a sealed envelope and addressed to Sellers at Crocker National Bank, Santa Barbara Main Office, 1001 State Street, Santa Barbara, California 93101, and deposited in the United States mails, postage prepaid.

18. *Commission.*

If and only if the purchase and sale hereunder is consummated, Sellers shall pay to Harold A. Toso out of the proceeds due Sellers from the escrow hereunder, a fee in an amount equal to six percent (6%) of the purchase price under Paragraph 2 as the same may have been adjusted pursuant to Paragraph 10.

EXECUTED at Santa Barbara, California as of the date first hereinabove written.

/s/ Whitney A. Collins, trustee u/w
Margaret Whitney Wilcox 1/30th

/s/ Whitney A. Collins, trustee u/w
Roy F. Wilcox 1/30th

/s/ Dede Wilcox Eddy 1/15th

Denis H. Wilcox 1/15th

/s/ Richard K. Wilcox 1/15th

/s/ Julia Collins Haselton 1/15th

Crocker National Bank, successor
trustee u/w Margaret Whitney Wilcox 1/3rd

Crocker National Bank, successor
trustee u/w Roy F. Wilcox 1/3rd

"SELLERS"

/s/ Harold A. Toso

"BUYER"

Amendment
to
Agreement of Purchase and Sale.

THIS AGREEMENT is made June ...., 1974, by and between WHITNEY A. COLLINS, TRUSTEE u/w MARGARET WHITNEY WILCOX; WHITNEY A. COLLINS, TRUSTEE u/w ROY F. WILCOX; DEDE WILCOX EDDY; DENIS H. WILCOX; RICHARD K. WILCOX; JULIA COLLINS HASELTON; CROCKER NATIONAL BANK, successor TRUSTEE u/w MARGARET WHITNEY WILCOX; and CROCKER NATIONAL BANK, successor TRUSTEE u/w ROY F. WILCOX; all hereinafter collectively referred to as "SELLERS" and HAROLD A. TOSO, hereinafter referred to as "BUYER."

WITNESSETH

WHEREAS, the parties hereto, SELLERS and BUYER, entered into an agreement entitled "Agreement of Purchase and Sale" dated November 30, 1973, pursuant to which SELLERS agreed to sell and BUYER agreed to buy, subject to the provisions of the Agreement, certain real property particularly described in Exhibit "A" to said Agreement; and

WHEREAS, the parties hereto, SELLERS and BUYER, desire to amend said "Agreement of Purchase and Sale" to extend certain times for performance thereunder;

NOW, THEREFORE, in consideration of the premises, and the covenants and conditions contained herein, it is mutually agreed that the "Agreement of Purchase and Sale" previously entered into is hereby amended as follows:

1. Paragraph No. 3 of said "Agreement of Purchase and Sale," which Paragraph is entitled "Escrow," and consisting of a portion of page 4 of said

Agreement, is amended in its entirety to provide in full as follows:

"3. *Escrow.*

Upon the execution of this Agreement the same shall become a binding contract of purchase and sale upon the terms hereof and the parties shall in purchase thereof forthwith enter into an escrow with Crocker National Bank as escrow holder, executing the usual form of instructions employed by said escrow holder, calling for the performance of this Agreement in accordance with its terms, provisions and conditions and within the period of time provided herein. All documents and payments required of the parties (excepting payments herein provided to be made to Sellers outside of escrow) shall be delivered into such escrow. Said escrow instructions shall be and shall be therein expressly stated to be for the purpose of implementing this Agreement of Purchase and Sale and shall not be deemed to modify or affect the terms hereof.

Said escrow shall close on or before sixty (60) days after Buyer shall have received the approval of the City of Santa Barbara and any and all other governmental bodies, agencies and commissions whose approval is necessary for the Buyer's development of said real property in accordance with Paragraph 14 and the times for filing of a referendum petition to overturn any such approval and for appeals from any action with respect to such development by any governmental body, agency or commission have expired, but in no event later than November 30, 1974, except as extended as hereinafter provided.

If escrow has not closed on or before November 30, 1974, in accordance with the above provisions of this Paragraph 3, Buyer shall have the right, provided Buyer is not in default of obligations under this Agreement, to extend said escrow until five (5) days after the happening of one of the following events, whichever first occurs.

a) The rejection by the City of Santa Barbara or by one of the other government entities whose approval is necessary for Buyer's development of said real property in accordance with Paragraph 14. "Rejection," for purposes hereof, shall mean a negative decision by a government entity followed by the elapse of all applicable appeal times, or if an appeal is timely filed, the sustaining of the initial negative decision following the pursuit of all appeal remedies, both administrative and legal.

b) The condemnation of the whole of the subject property, as evidenced by the filing of a legal action to condemn in the form of a complaint filed with the appropriate court.

Anything in the foregoing provisions of this Paragraph 3 to the contrary notwithstanding, in no event shall the time for the close of said escrow continue beyond January 15, 1977.

Buyer shall have the right to cause said escrow to close at any earlier time than as specified in this Paragraph 3 by so notifying the SELLERS and the escrow holder any by depositing the sums and documents required therefor by the provisions of Paragraph 2 of this Agreement."

2. The escrow instructions referred to above shall be amended as required, to properly reflect this Amendment to the "Agreement of Purchase and Sale."

3. In all other respects, and except as specifically amended by this instrument, said "Agreement of Purchase and Sale" shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first set forth hereinabove.

/s/ WHITNEY A. COLLINS, Trustee
u/w Margaret Whitney Wilcox
/s/ WHITNEY A. COLLINS, Trustee
u/w Roy F. Wilcox
DEDE WILCOX EDDY
DENIS H. WILCOX
RICHARD K. WILCOX
JULIA COLLINS HASELTON
CROCKER NATIONAL BANK, Successor
Trustee u/w Margaret Whitney Wilcox
CROCKER NATIONAL BANK, Successor
Trustee u/w Roy F. Wilcox

"SELLERS"

/s/ HAROLD A. TOSO

"BUYER"

APPENDIX 2.

Santa Barbara City Planning Commission Resolution No. 174.

SUBJECT: Application of Gerald B. Parent and Harold Toso for a change in land use zone classification, under provisions of Parts 2 and 24 of City Zoning Ordinance 2585, from E-1 and R-1 One Family Residents Zones to E-1-R-H and R-1-R-H One Family Residence Zones with a Resort Hotel overlay on City Parcels 41-330-01 and 47-010-28 & 29 for 65.4 acres, south of the intersection of Cliff Drive and Las Positas Road.

WHEREAS the City Planning Commission has held the required public hearing on the above application; and the applicant was present.

WHEREAS, 3 persons appeared to speak in favor of the application and 18 persons appeared to speak in opposition thereto, and the following exhibits were presented for the record:

a. Location and present zone map and proposed site plan.
b. Environmental Impact Report.
c. Letters from applicant.
d. Five letters in opposition.
e. One letter in support.
f. Letter from Henningson, Durham & Richardson.
g. Public Works Dept. Letter.
h. Letter from Certified Public Accountant.
i. Petition in opposition with 60 to 70 signatures.
j. Three revised site plans.
k. Revised landscape plan and golf course plan.

WHEREAS, the matter having been fully considered by this Commission, the Planning Commission finds as follows:

Findings:

This is an inappropriate location for R-H zoning. It would set an unfortunate commercial precedent for the Las Positas Valley and overall is an unwise land use decision.

There are too many questions about decentralizing the activities in the community when trying to revitalize the downtown area.

The Task Force study and the outcome of the redevelopment study should be considered.

The possible adverse effect of a major hotel here combined with the possibility of a major hotel in the redevelopment area on the labor force in Santa Barbara.

Possible impact on the present commercial area on the Mesa and the possible expansion as a direct result of this development.

There are reservations regarding the economic feasibility of the project in this location and the possibility that it will have to be converted to some other use at a future date.

The public input has generally been unfavorable towards the project and wish to preserve the present residential character of the area.

NOW, THEREFORE IT IS RESOLVED that the City Planning Commission hereby denies the subject request, subject to the following conditions:

Passed and adopted this 17 day of October, 1974, by the Planning Commission of the City of Santa Barbara, by the following vote:

AYES: 4
NOES: 3
Abstained: 0
Absent: 0

CITY PLANNING COMMISSION
SANTA BARBARA, CALIFORNIA

I hereby certify that the above Resolution was adopted by the Santa Barbara City Planning Commission at its meeting of the above date.

/s/ Maryanne Ruiz
Secretary

NOTE: This action of the City Planning Commission shall become effective 10 days from date of mailing of this resolution copy, unless appealed to City Council within that time, and shall remain in effect thereafter unless the conditions have not been met, or unless the ..... is unused, abandoned or discontinued for a period of 6 months.

(the above shall not apply to rezonings)

APPENDIX 3.

Decision and Findings of the City Council of the City of Santa Barbara in the Matter of the Appeal of Daon Corporation of a Denial of a Tentative Subdivision Map to Divide Assessor's Parcels Nos. 41-330-01, 47-010-28 and 47-010-29, Located South of the Intersection of Cliff Drive and Las Positas Roads.

WHEREAS, the application was filed with the City by DAON CORPORATION for approval of a tentative subdivision map to divide Parcels Nos. 41-330-01, 47-010-28 and 47-010-29 located south of the intersection of Cliff Drive and Las Positas Roads; and

WHEREAS, on February 7, 1980, at a duly noticed public hearing, the Planning Commission denied said application; and

WHEREAS, on February 28, 1980, the DAON Corporation filed with the City a timely appeal to the City Council from the Planning Commission decision; and

WHEREAS, on February 26, 1980, the City Council held a duly noticed public hearing on DAON Corporation appeal; and

WHEREAS, at the public hearing, the City Council received a report from the Planning Staff dated February 26, 1980 which included the preliminary reports of the Planning Staff to the Planning Commission and the reports of the Department of Public Works dated February 7 and 28, 1980. The Council also received oral and written testimony from the DAON Corporation, from members of City Staff. The City Council also considered the Environment Impact Report which had been prepared; and

WHEREAS, at the conclusion of the public hearing, the City Council continued the matter to its meeting on March 4, 1980.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SANTA BARBARA MAKES THE FOLLOWING DECISION AND ADOPTS THE FOLLOWING FINDINGS:

1. The appeal of the DAON Corporation is granted.

2. The tentative subdivision map is approved subject to the conditions attached hereto.

3. The City Council makes the following findings.

a. The tentative subdivision map, as conditioned herein, is consistent with the General Plan of the City of Santa Barbara.

b. The project as conditioned and approved mitigates, to the extent feasible by the City, the environmental effects identified in the Environment Impact Report. Mitigation measures are set forth in the staff report and in the conditions set forth below. Mitigation measures subject to approval or action of other agencies as identified in the EIR can and should be adopted by such agencies.

c. The project, as conditioned and proposed, meets the requirements of the General Plan, and the zoning and subdivision ordinances of the City. No further mitigation of the impact on air quality, alteration of the scenic character of the coast, and alteration of drainage is necessary or feasible by the City. Other development would have similiar impacts. The potential significant adverse effects have been mitigation by modifications made to the project by the applicant, and by the conditions imposed in this approval.

Supreme Court, U. S.
FILED
SEP 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-205

IN THE

Supreme Court of the United States

October Term 1980

HAROLD A. TOSO,

Petitioner,

vs.

CITY OF SANTA BARBARA,

Respondent.

PETITIONER'S REPLY BRIEF. (IN SUPPORT OF PETITION FOR CERTIORARI)

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HAROLD A. TOSO,

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CITY OF SANTA BARBARA,

Respondent.

PETITIONER'S REPLY BRIEF. (IN SUPPORT OF PETITION FOR CERTIORARI)

The central stategy of Responent is to execute a massive diversion from the grave and nationally widespread constitutional issues raised here, toward a quarrelsome examination of factual minutiae.[1] Petitioner suggests in reply that

[1]Petitioner sharply rejects Respondent's *ad hominem* asseverations concerning the supposed lack of accuracy in Appellant's factual presentation in the Petition (see Br. Opp. at p. 1). In truth, the shoe is on the other foot. Respondent simply ignores the trial court's findings of fact, asserting that it contended below that certain of such findings are — in Respondent's view — lacking evidentiary support. But Respondent conveniently overlooks that such self-serving contentions received no credence in the reviewing courts below. In the [second] Court of Appeal opinion presented here for review, the court below declined to reach many of such matters, while in the [first] opinion, the trial court's findings were reviewed and largely upheld. With respect to such [first] opinion — see Pet. Cert., pp. 27 et seq., Appendix B — one can scarcely believe that Respondent is serious when it effectively asserts (Br. Opp., p. 3, fn. 4) that a California state court rule concerning publication of appellate opinions somehow forbids this Court from reading a decision appearing in the West California Reporter (at 151 Cal. Rptr. 912). This argument comes too close to an endorsement of Orwell's "memory hole" for comfort. The point is that to the extent Respondent's attack on the trial court's findings was considered below, it largely failed, and those findings (Pet. Cert. at pp. 58 et seq., Appendix E) tell the seamy saga of what transpired in this case. Petitioner won below as a matter of law, and this is the place where issues of law are reviewed; this is no place to quarrel with the trial court's findings.

these are matters to be addressed in a brief on the merits, not here. Suffice it to note here by way of short reply only a few of Respondent's inaccurate assertions:

Item: The subject property is not "surrounded" by single-family zoned land (Br. Opp. at p. 4).[2] Rather, its largest boundary is the Pacific Ocean; it sits on a mesa and is thereby separated by natural topography from nearby single-family zoning on a second side. Its contiguity to such land is thus minimal.

Item: The referendum whether to acquire the subject property (see Pet. Cert. at p. 6) was not "advisory". That is Respondent's self-serving characterization. The referendum proposition began with the words: "*Shall* the City of Santa Barbara purchase for open space purposes the [subject property]. . .?", emphasis added. The use of the word "shall" hardly comports with any notion of "advice". The word "shall" is unequivocally a command. The electorate voted "yes", and thereby expressed its command that the city "shall" acquire the subject property.

Item: The italicized sentence at Br. Opp., p. 5, is distortively signigicant in what it obscures. The city *at that time* carefully refrained from saying publicly that it decided *not* to purchase the subject property; instead it vaguely asserted that it had not decided *to purchase*, thus leaving the subject property blighted under the cloud of the then widely publicized municipal acquisitory plans and activities, and preventing Petitioner from using it.

Item: The assertion at Br. Opp., p. 5, that there was no consideration of acquisition at the zoning hearing, is correct. But what Respondent fails to note is that such con-

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[2]The Brief of Respondent in Opposition is cited here as "Br. Opp.", followed by pertinent page number.

sideration took place at the various illegal, secret "executive" sessions (see Pet. Cert. at pp. 6, 7, 8 and 9).

Item: The undisputed fact of the testimony of an appraiser as to the subject property's market value (Br. Opp., at p. 6) is misleading, because whatever such value, Petitioner lost the property altogether; thus, as far as *he* is concerned, *the City's actions deprived him of everything*. Whatever the property may be theoretically worth, it was taken away from Petitioner. Thus its value only underscores his loss. Even on the Respondent's premise, Petitioner's losses are in the millions.

Finally, *item:* the assertion at Br. Opp. at p. 6, to the effect that *in 1980* (3 years *after* Petitioner lost the property) the Respondent approved subdivision of the subject property into 68 residential lots is not only outside the record, but is misleading as well; Respondent fails to inform the Court that such proposed use was promptly disapproved by the California Coastal Commission[3] which has the last word, and which has consistently taken the position that sound land use planning called for development of the subject property into the very use desired by Petitioner (and endorsed by the original city general plan). Thus, because of the Commission's position, the subject property can only be used for a resort hotel, but because of the City's position it can only be used for single family residences. The upshot of this regulatory Catch-22 is that the property cannot be put to private uses at all — which is what the city had in mind in the first place.

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[3]Note well that the Coastal Commission's dim view of the use of the subject property for single family residential housing was well known. The Commission has throughout been of the view that the subject property should be used *as a resort hotel* (See Pet. Cert. at p. 8).

In sum, Respondent's charges of inaccuracy are themselves untrue.

This case presents this Court with a grave and widespread constitutional issue that is bedeviling the entire country. The Court also has before it a rank injustice that cries out for relief.

Petitioner prays that the writ issue.

Respectfully submitted,

GIDEON KANNER,

Attorney for Petitioner.